CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 556/146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS, ETC., ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JULY 28, 1924

(30,521)

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 556

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS, ETC., ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1925

[fol. 1] **IN SUPREME COURT OF WISCONSIN**

WRIT OF ERROR—Filed June 23, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of Wisconsin, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in said suit; in the Matter of the Estate of Ferdinand Schlesinger, deceased, between Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, Executors of the Last Will and Testament of Ferdinand Schlesinger, deceased; Mathilde Schlesinger; Armin A. Schlesinger; Henry J. Schlesinger; and Gertrude MacLaren, appellants, and the State of Wisconsin and County of Milwaukee, respondents; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity; a manifest error has happened to the great damage of the said Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, Executors of the Last Will and Testament of Ferdinand Schlesinger, deceased; Mathilde Schlesinger; Armin A. [fol. 2] Schlesinger; Henry J. Schlesinger; and Gertrude MacLaren, as by their complaint appears;

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 23rd day of July next in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 23rd day of June in the Year of Our Lord One Thousand Nine Hundred and Twenty-four.

Wm. H. Comerford, Clerk of the District Court of the United States in and for the Western District of Wisconsin, by Fred W. French, Chief Deputy. (Seal U. S. District Court, Western Dist. of Wisconsin, Madison.)

The above writ is allowed by: A. J. Vinje, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fols. 3-9] The return to the within writ appears by the schedule hereto annexed, the return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur B. McLeod, Clerk. (Seal Supreme Court of Wisconsin.)

[File endorsement omitted.]

[fol. 10] IN SUPREME COURT OF WISCONSIN

No. 81

In the Matter of the Estate of FERDINAND SCHLESINGER, Deceased

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, and MYRON T. MacLAREN, Executors of the Last Will and Testament of Ferdinand Schlesinger, Deceased; Mathilde Schlesinger; Armin A. Schlesinger, Henry J. Schlesinger, and Gertrude MacLaren, Appellants,

vs.

STATE OF WISCONSIN and COUNTY OF MILWAUKEE, Respondents.

ASSIGNMENT OF ERRORS—Filed June 23, 1924

Now come the appellants above named by Fawsett, Smart & Shea, their attorneys, and make and file this their assignment of errors and say that in the record and proceedings in the above entitled cause and also in the giving of the judgment heretofore rendered in said cause by said Supreme Court of Wisconsin, there is manifest error in the respects hereinafter set forth, to-wit:

[fol. 11] 1. That the said Supreme Court of Wisconsin erred in affirming by its judgment the final order and judgment of the County Court of Milwaukee County, from which these appellants had taken an appeal to the Supreme Court of Wisconsin, which adjudged that the gifts made by the above named Ferdinand Schlesinger, deceased, to certain of these appellants, being the wife and children of said decedent, within six years prior to his death, but which were not as a matter of fact made in contemplation of the death of the donor, were to be construed as having been made in contemplation of death and were subject to the taxes imposed upon transfers of property made in contemplation of death under the statutes of Wisconsin and particularly that portion of Section 72.01 of said statutes which reads as follows:

Section 72.01. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed * * * to any person, association or corporation * * * in the following cases * * *

(3) When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this State

or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain sale or gift made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section:

[fol. 12] and in adjudging, contrary to the contention of these appellants, that said provisions of the statutes, as applied to the gifts so made to the decedent's wife and children as aforesaid, but not made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are valid and not in conflict with or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly that portion of Section (1) of said Amendment which reads as follows:

Nor shall any state deprive any person of life, liberty or property without due process of law;

or that portion of Section (1) of said Fourteenth Amendment which reads as follows:

Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws.

2. That said Supreme Court of Wisconsin erred in refusing to adjudge, as requested by said appellants, that the gifts which were made by the decedent to his wife and children within six years next prior to his death and which were not, as a matter of fact, made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, were not subject to the inheritance tax imposed by the said statutes of Wisconsin, and that the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, which prescribe that such gifts shall be subject to the tax [fol. 13] thereby imposed upon transfers made in contemplation of death and shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are invalid, unconstitutional and void, as being in conflict with and in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section (1) of said Amendment which reads as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law;"

and that portion of Section (1) of said Amendment which reads as follows:

"Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws;"

3. That the said judgment of the Supreme Court of Wisconsin, affirming the said judgment of the County Court of Milwaukee County, is repugnant to and in conflict with the provisions of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly those portions of Section (1) of said Amendment which read as follows:

Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person the equal protection of the laws.

[fol. 14] And these appellants pray that the judgment aforesaid, for the erors aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing and that they may be restored to all things which they have lost by occasion of the said judgment.

Fawsett, Smart & Shea, Attorneys for the Appellants.
Charles F. Fawsett, Edward M. Smart, Charles E. Monroe, of Counsel.

[fols. 15-31] [File endorsement omitted.]

[fol. 32] STATE OF WISCONSIN:

IN COUNTY COURT OF MILWAUKEE COUNTY IN PROBATE

In the Matter of the Estate of FERDINAND SCHLESINGER, Deceased

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR—Filed Dec. 29, 1923

To Honorable John C. Karel, Judge of said County Court; Honorable John Harrington, Inheritance Tax Counsel for the Wisconsin Tax Commission, and Honorable Neele B. Neelen, Public Administrator of Milwaukee County:

Please take notice that Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, as sole acting executors of the last will and testament of said Ferdinand Schlesinger, deceased, hereby appeal to the Supreme Court of the State of Wisconsin from those portions of the order, finding and determination made and entered by said County Court of Milwaukee County in the above entitled proceeding on the 11th day of September, A. D. 1923, which find and determine that certain gifts which had been made by said decedent to his wife and children during the lifetime of said decedent and within six years next prior to his death, were subject to inheritance under the laws of the State of Wisconsin and determine the amount of such taxes.

[fol. 33] And the appellants as the grounds of their appeal and as their assignment of errors upon said appeal hereby assign as error:

1. That said County erred in refusing to find as a conclusion of law as requested by these appellants that the gifts referred to in the third of the Court's findings of fact, made and filed in said proceeding on the 24th day of March, 1923, which were made by the decedent to his wife and children within the six years next prior to his death, are not subject to the inheritance tax and that the provisions of Section 72.01, Clause (3) of the Statutes of Wisconsin, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the Constitution of Wisconsin and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and particularly of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law", and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws".

[fol. 34] 2. That the Court erred in finding as a part of the third of the findings of fact made and filed by the Court on the 24th day of March, 1913, in the above entitled matter that—notwithstanding that none of the gifts made by the decedent within six years next prior to his death were in fact made in view or in anticipation, expectation or apprehension of death or in the actual contemplation of death as said term "contemplation of death" was used in the statute and had been defined and interpreted by the Supreme Court of the State of Wisconsin piror to the enactment of Chapter 643 of the Laws of 1913 and nothwithstanding that none of said gifts were intended to take effect in possession or enjoyment at or after the death of the decedent:—all of the gifts so made by the decedent within the six years next prior to his death must be construed to have been made in contemplation of death within the terms and provisions of Section 72.01, Clause (3) of the Wisconsin Statutes; for the reason that the provisions of said Section 72.01, Clause (3) of the Wisconsin Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said Section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the Constitution of Wisconsin and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor shall any state de-[fol. 35] prive any person of life, liberty or property without due process of law," and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny

to any person within its jurisdiction the equal protection of the laws."

3. That the Court erred in finding as a part of the second conclusion of law contained in its findings of March 24th, 1923, that the gifts referred to in the third of its findings of fact, made by the decedent to his wife and children within the six years next prior to his death are, by the express terms of Section 72.01, Clause (3) of the Wisconsin Statutes, subject to inheritance taxes, although not in fact made in contemplation of death, for the reason that the provisions of said Section 72.01, Clause (3) of the Wisconsin Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void for the reasons set forth in the next preceeding assignment of error.

4. That the Court erred in finding as a part of its said second conclusion of law as follows: "Which section of the Statutes" (referring to Section 72.01, Clause (3) of the Wisconsin Statutes) "I hold to be constitutional and valid;" for the reason that the provisions of Clause (3) of said Section 72.01 of the Statutes, prescribing that gifts made within six years next prior to the death of [fol. 36] the doner shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void for the reasons set forth in the second of these assignments of error.

5. That the Court erred in finding and directing in its fourth conclusion of law that the finding and determination of the inheritance taxes in said estate are to be made in accordance with the foregoing findings of fact and conclusions of law, including the findings of fact and conclusions of law to which error is hereby assigned in the foregoing assignments of error, for the reasons set forth in the second of these assignments of error.

6. That the Court erred in that portion of its order, finding and determination made and filed in said proceeding on the 11th day of September, 1923, which finds and determines that the gifts made by the decedent within six years next prior to his death are subject to the inheritance tax under the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, and which determines the amount of such taxes for the reason that the provisions of said Clause (3) of said Section 72.01 of said Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the Constitution of Wisconsin, and as being in [fols. 37-43] conflict with and in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section 1 of said Fourteenth Amendment

which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law," and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

Dated this 9th day of November, 1923.

Fawsett and Smart, Attorneys for the Appellants.

[fol. 44] In County Court of Milwaukee County

[Title omitted]

Notice of Appeal and Assignment of Error—Filed Dec. 29, 1923

To Honorable John C. Karel, Judge of said County Court; Honorable John Harrington, Inheritance Tax Counsel for the Wisconsin Tax Commission; and Honorable Neele B. Neelen, Public Administrator of Milwaukee County:

Please take notice That Mathilde Schesinger, the widow of the said Ferdinand Schlesinger, deceased, hereby appeals to the Supreme Court of the State of Wisconsin from that portion of the order, finding and determination made and entered by said County Court of Milwaukee County in the above entitled proceeding on the 11th day of September, A. D. 1923, finding and determining the inheritance taxes to be paid upon the respective shares or transfers of shares or interests of the various legatees, devisees and donees mentioned in said order, finding and determination, which finds and determines that certain gifts which had been made by said decedent to this appellant during the lifetime of said decedent and within six years prior to his death, were subject to inheritance taxes under the laws of the State of Wisconsin and determines the amounts of such taxes. [fol. 45] And the appellant, as the grounds of her appeal and as her assignment of errors upon said appeal hereby assigns as error:

1. That said County Court erred in refusing to find as a conclusion of law as requested by the executors of the Will of said Ferdinand Schlesinger, deceased, that the gifts referred to in the third of the court's findings of fact, made and filed in said proceeding on the 24th day of March, 1923, which were made by the decedent to this appellant, as the wife of said decedent, within the six years next prior to his death, are not subject to the inheritance tax and that the provisions of Section 72.01, Clause (3) of the Statutes of Wisconsin, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the Constitution of Wisconsin and as being in conflict with and in violation of Section 1

of the Fourteenth Amendment to the Constitution of the United States, and particularly of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law," and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the law."

[fol. 46] 2. That the Court erred in finding as a part of the third of the findings of fact, made and filed by the Court on the 24th day of March, 1923, in the above entitled matter, that—notwithstanding that none of the gifts made by the decedent within six years next prior to his death were in fact made in view, or in anticipation, expectation or apprehension of death, or in the actual contemplation of death as said term "contemplation of death" was used in the statute and had been defined and interpreted by the Supreme Court of the State of Wisconsin prior to the enactment of Chapter 643 of the Laws of 1913; and notwithstanding that none of said gifts were intended to take effect in possession or enjoyment at or after the death of the decedent:—all of the gifts so made by the decedent within the six years next prior to his death and particularly the gifts so made to this appellant within said period, must be construed to have made in contemplation of death within the terms and provisions of Section 72.01, Clause (3) of the Wisconsin Statutes; for the reason that the provisions of said Section 72.01, Clause (3) of the Wisconsin Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said Section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the Constitution of Wisconsin and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section 1 of said Four-
[fol. 47] teenth Amendment which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law," and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

3. That the Court erred in finding as a part of the second conclusion of law contained in its findings of March 24th, 1923, that the gifts referred to in the third of its findings of facts, made by the decedent to this appellant as his wife within the six years next prior to his death are, by the express terms of Section 72.01, Clause (3) of the Wisconsin Statutes, subject to inheritance taxes, although not in fact made in contemplation of death, for the reason that the provisions of said Section 72.01, Clause (3) of the Wisconsin Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void for the reasons set forth in the next preceding assignment of error.

4. That the Court erred in finding as a part of its said second conclusion of law as follows: "Which section of the Statutes" (referring to Section 72.01 Clause (3) of the Wisconsin Statutes "I hold to be constitutional and valid;" for the reason that the provisions of Clause (3) of said Section 72.01 of the Statutes, prescribing that gifts made [fol. 48] within six years next prior to the death of the donor shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void for the reasons set forth in the second of these assignments of error.

5. That the court erred in finding and directing in its fourth conclusion of law that the finding and determination of the inheritance taxes in said estate are to be made in accordance with the foregoing findings of fact and conclusions of law, including the findings of fact and conclusions of law to which error is hereby assigned in the foregoing assignments of error, for the reasons set forth in the second of these assignments of error.

6. That the court erred in that portion of its order, finding and determination made and filed in said proceeding on the 11th day of September, 1923, which finds and determines that the gifts made by the decedent within six years next prior to his death and particularly the gifts so made to this appellant, although not in fact made in contemplation of death, are subject to the inheritance tax under the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, and which determines the amount of such taxes, for the reason that the provisions of said Clause (3) of said Section 72.01 of said Statutes, prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1 and Article VIII, Section 1 of the [fols. 49-100] Constitution of Wisconsin, and as being in conflict with and in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law," and of that portion of Section 1 of said Fourteenth Amendment which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

Dated this 9th day of November, 1923.

Fawsett and Smart, Attorneys for the Appellant.

[fol. 101] COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

PETITION OF EXECUTORS—Filed in County Court December 8, 1922; in Supreme Court December 29, 1923

The petition of Henry J. Schlesinger, Armin A. Schlesinger and Myron T. MacLaren, Executors of the last will and testament of the above named Ferdinand Schlesinger, deceased, respectfully represents and shows unto the court as follows:

That these petitioners, together with one Edward G. Wilmer, were duly appointed executors of the last will and testament of said decedent on the 7th day of January, 1921, and that letters testamentary were duly issued to them on that day; that these petitioners and said Wilmer thereafter continued to act as such executors until some time in the spring of 1922, since which time said Wilmer, who previously removed from the State of Wisconsin and has since been engaged in business in the city of Akron, in the State of Ohio, has been unable to take any active part in the administration of said estate, and is not now within the State of Wisconsin, and these [fol. 102] petitioners have ever since been and now are the sole acting executors of said estate.

That said decedent left an estate which, with the exception of a lot in Forest Home Cemetery in the city of Milwaukee, consisted entirely of personal property. That an inventory of all of such property which had come to the notice of the executors at the time of the making of the same has been duly filed; that the property therein listed has been appraised by Fred W. Rogers and Wm. E. McCarty, general appraisers, and by Jackson B. Kemper who was appointed by this court as special appraiser under the provisions of Sections 72.13, 72.14, and 72.15 of the Wisconsin Statutes of 1922, and whose report is on file in this court, at the value of $2,062,911.65. That certain other assets in addition to the property set forth in said inventory, have since been discovered by the executors of a value less than $1,000.00.

That in addition to the estate left by the decedent at the time of his death and disposed of by his will, the decedent during his lifetime and within six years prior to his death had transferred, by way of gift, to his wife, Mathilde Schlesinger, and to his sons Henry J. Schlesinger, and Armin A. Schlesinger, and his daughter Gertrude MacLaren, property of considerable value which has been appraised by the special appraiser as shown by his report on file in this court, as follows:

Gifts to Mrs. Schlesinger	$1,115,772.10
Henry J. Schlesinger	1,757,923.13
Armin A. Schlesinger	1,716,258.04
Gertrude MacLaren	1,791,657.15

[fol. 103] And that in addition to the foregoing, said Mathilde Schlesinger has received upon policies of insurance on her husband's

life, payable directly to her by the terms of the policies, the sum of $40,096.23.

These petitioners allege that none of the said transfers or gifts so made by said Ferdinand Schlesinger as aforesaid to his said wife and children within the six years prior to his death were as a matter of fact made in contemplation of death, and that the said special appraiser in his said report has expressly found that the same were not made in contemplation of death; and these petitioners contend that the provisions of Section 72.01 Clause (3), which provide that such gifts shall be construed to have been made in contemplation of death, and thereby subject them to the payment of inheritance taxes as transfers made in contemplation of the death of the donor, are invalid, unconstitutional and void, as being in conflict with and in violation of Article I, section one, and Article VIII section 1, of the Constitution of Wisconsin; and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

That the time fixed by the Court for filing claims of creditors has elapsed and that claims have been filed against said estate amounting to $1,611,445.00 and that no objections have been filed to any of these. That a list of said claims is hereto attached, marked "Exhibit A," and made part of this petition.

That the expenses of administration are estimated as not less than $150,000.00

[fol. 104] That the specific legacies provided for in the will of decedent amount to $317,385.00, of which $250,000.00 are in gifts to charitable organizations which are exempt from inheritance taxes.

That after the payment of the foregoing legacies the residuum of the estate is given in trust for certain purposes which are set forth in the will, but that as a matter of fact the payment of debts and specific legacies and the expenses of administration will exhaust the entire estate.

That your petitioners have collected in cash from the assets of said estate sums amounting to $1,490,161.05 and have received by way of income sums amounting to $64,638.30.

That they have paid out on account of claims which have been filed sums amounting to $1,429,942.56 and on account of specific legacies sums amounting to $57,000.00; and on account of taxes and other expenses of administration sums amounting to $18,165.92.

That there still remains a balance of claims unpaid amounting to $181,502.41, and a balance of special legacies unpaid amounting to $260,385.00.

That certain shares of stock of the Steel & Tube Co. of America, and of The Newport Co., listed in the inventory, and together appraised as of the value of $725,901.98, have been sold by the executors, after the receipt of dividends thereon amounting to $60,711.00, for the price of $665,190.98, and that $232,812.66 of said purchase price has been paid in cash and the balance is to be paid in two annual instalments, due respectively May 1, 1923, and May 1, 1924.

[fol. 105] That there are collectible debts due the estate which have not yet been collected and cannot be collected for at least one

year from the present time and that until the collection of such debts these petitioners will not have funds sufficient to pay the debts of the estate, and that it is not possible at the present time to proceed to the final settlement of said estate.

That the inheritance taxes due from said estate as estimated by these petitioners have been paid, but have not yet been definitely fixed and determined by this court, and that it is important that the inheritance taxes upon the various legacies, gifts and transfers above mentioned should be so fixed and determined in order that any balances due thereon may be paid and the running of interest on such balances may cease.

Wherefore these petitioners pray for an order extending for a period of one year the time within which these petitioners shall pay the debts and legacies and make a final settlement of the estate and of their account as such executors, and fixing a time and place for the hearing of this petition; and also for an order fixing a time and place for the determination and adjudication of the inheritance taxes payable in said estate, without waiting for such final settlement of said estate.

Armin A. Schlesinger, Henry J. Schlesinger, Myron T. McLaren.

[fol. 106] STATE OF WISCONSIN,
County of Milwaukee, ss:

Henry J. Schlesinger, Armin A. Schlesinger and Myron T. MacLaren, the petitioners above named, being first duly sworn, depose and say that they have read the foregoing petition by them subscribed and know the contents thereof and that the same is true to their own knowledge.

Armin A. Schlesinger, Henry J. Schlesinger, Myron T. MacLaren.

Subscribed and sworn to before me this 7th day of December, 1922. Charles E. Monroe, Notary Public, Milwaukee Co., Wis.

[fol. 107] [File endorsement omitted.]

[fol. 108] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

ORDER APPOINTING SPECIAL APPRAISER—Filed December 29, 1923, Supreme Court

On reading and filing the verified petition of Henry J. Schlesinger, Armin A. Schlesinger, Myron T. MacLaren and Edward G. Wilmer, executors of the last will and testament of Ferdinand Schlesinger,

making application for the appointment forthwith of a special appraiser to fix the fair market value of the estate of said Ferdinand Schlesinger for the purposes of the inheritance tax, and the court having given careful consideration to the matter of said petition and it appearing to the satisfaction of the court that occasion exists for the appointment of such special appraiser, on the record and all the files and proceedings in the above entitled matter,

It is hereby ordered that said Jackson B. Kemper, a competent and suitable person be and he hereby is appointed as special appraiser to fix the fair market value of said estate under and in accordance with sections 1087-13 and 1087-14 and the cognate provisions of the statute of the State of Wisconsin for the purposes of the determination of the amount of the inheritance tax to which [fol. 109] said estate or any transfer or transfers of property made by the decedent may be subject.

By the Court,

Dated March 12/1921.

John C. Karel, County Judge. (Seal Milwaukee County Court, Wisconsin.)

[fol. 110] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

To the Honorable the Judges of the County Court of Milwaukee County:

REPORT, FINDINGS, AND APPRAISAL OF JACKSON B. KEMPER, SPECIAL APPRAISER—Filed County Court September 7, 1922; in Supreme Court December 29, 1923.

By an order of the court made and entered upon the 12th day of March, 1921, I was appointed Special Appraiser, pursuant to the Statutes, to fix the fair market value of the estate of said decedent for the purpose of the determination of the amount of inheritance tax to which said estate, or any transfer or transfers of property made by the decedent, might be subject. I thereupon gave notice to the Tax Commission of the State of Wisconsin, to the Public Administrator for the County of Milwaukee, to the executors and trustees under the will of said deceased, to sundry legatees under said will, to the attorneys for the executors and trustees, and to George E. Ballhorn, guardian ad litem for sundry minors interested in said estate, that I would hold a hearing on said matter at my office in the City of [fol. 111] Milwaukee on the 25th day of April, 1921. A copy of said notice is attached to this report.

On said 25th day of April, 1921, there appeared Messrs. Fawsett & Smart, on behalf of the executors, George E. Ballhorn, Esq.,

guardian ad litem, in person, John Harrington Esq., inheritance tax counsel, and E. E. Brassard, Esq., Assistant Attorney General, on behalf of the State of Wisconsin, the Tax Commission, and the Public Administrator, and, pursuant to my request, Messrs. Fred W. Rogers and W. E. McCarty, general appraisers of this court, were also present.

After a discussion with counsel, I determined that considering the apparent large monetary value of the estate, and the nature of the questions involved, the hearings before me should follow as far as possible the practice in a reference, and that such findings as I might make on any controverted questions should be based upon testimony offered before me by the various parties in interest. This method of procedure was agreeable to counsel and was thereafter followed, and from time to time hearings were had before me, witnesses sworn and examined, and I herewith return into court the testimony taken and the various written exhibits offered by the respective parties and received in evidence.

It was deemed best that no formal appearance be made or entered by the general appraisers, but at my request they, or one of them, attended practically all of the hearings, and a copy of all of the testimony taken was furnished to the general appraisers, and the general appraisers and the special appraiser have worked in harmony in an effort to fix the fair market value of the estate.

[fol. 112] As will fully appear from the testimony returned into court, there was controversy only over the value of two items in the inventory, to wit: stock in the Steel & Tube Company of America and in the Newport Company. Upon all other items contained in the inventory there was no controversy, and no testimony was offered, and it was agreed by all parties that the appraisal of such items should be made by me in conjunction with the general appraisers.

I have, therefore, made specific findings only upon such matters as were in controversy, and pursuant to such findings (which are attached to this report) have fixed the clear market value of the items in controversy, and as to the uncontroverted items have fixed the clear market value in accordance with the estimate made by the general appraisers, which in my opinion are correct and just.

[fol. 113] As I have already pointed out, Mr. Schlesinger gave to the various members of his family, in 1916, stock in the Newport Mining Company, which was subsequently exchanged for common stock in the Steel & Tube Company of America and the Newport Company respectively. I am of the opinion (and counsel agreed) that these gifts are to be treated as though they were gifts of stock in the Steel & Tube Company of America and the Newport Company respectively, and have appraised them as such.

Subsequently, and on or about the first of October, 1919, Mr. Schlesinger made additional gifts to his two sons and daughter of stock in the Steel & Tube Company of America and the Newport Company respectively, which gifts I have appraised at the value heretofore found for stock in these companies.

In 1916 Mr. Schlesinger also made gifts to his wife, his two sons and his daughter of stock in the Milwaukee Coke & Gas Company,

Harrow Spring Company and Detroit Iron & Steel Company, both preferred and common, which stock were subsequently, in the year 1919, sold by the respective donees to the Newport Company for cash, and I have therefore, appraised those gifts at the amount of cash actually received by the various donees from such sale.

[fol. 114] During the six years prior to his death Mr. Schlesinger made sundry advances in money to his wife and three children as follows:

To Mrs. Mathilde Schlesinger	$30,124.00
" H. J. Schlesinger	51,881.82
" Armin A. Schlesinger	10,217.73
" Mrs. Gertude MacLaren	36,000.00
" Mrs. Gertrude MacLaren	49,619.09

Which gifts, or advances, I have appraised at the respective amounts thereof.

Prior to December 31, 1914, and therefore more than six years prior to his death, Mr. Schlesinger made certain gifts or advances to his wife and his two sons, as follows:

To Mrs. Mathilde Schlesinger	$32,582.32
" H. J. Schlesinger	34,493.62
" Armin A. Schlesinger	250,274.99
" Armin A. Schlesinger	4,980.50

The amounts of these respective gifts or advances were carried on Mr. Schlesinger's books, but no interest was ever charged to the recipients and no payments made by the recipients on account for any of the advances so made.

The $250,274.99 given to Armin A. Schlesinger, and which represented the cost of a homestead built by Mr. Schlesinger for his son in the city of Milwaukee, was cancelled or written off upon the books under date of October 15, 1917. The other amounts given to Armin A. Schlesinger, both prior and subsequent to January 1, 1915, and the amounts given to H. J. Schlesinger, both prior and subsequent to January 1, 1915, above mentioned, were cancelled or written off on the books under date of December 15, 1919. The amounts given to Mrs. Schlesinger, both before and subsequent to January 1, 1915, above mentioned, were written off upon the books under date of December 31, 1920.

I am of the opinion that Mr. Schlesinger at all times intended the sums so given prior to the first day of January, 1915, to be gifts to his wife and sons, and even if that were not the fact they had ceased [fol. 115] to be assets of the estate prior to his death by virtue of the six-year statute of limitation.

I am of the opinion further that the evidence clearly establishes that these advances or gifts made more than six years prior to Mr. Schlesinger's death were not made "in contemplation of death," and I have, therefore, not made any appraisal gifts or advances, or any of them.

Considerable evidence was offered by the executors with the object of showing Mr. Schlesinger's condition of health and state of mind at the time of making the various gifts to the members of his family within six years prior to his death. This evidence was taken subject to objection on the part of counsel for the State of Wisconsin for the Tax Commission. Under the decision of the Supreme Court in State v. Ebeling, 169 Wis. 432, it is obvious that so far as the special appraiser is concerned it is entirely immaterial whether the gifts were made in contemplation of death or not.

Counsel for the executors stated frankly that it was their intention to carry this case to the Supreme Court and to seek to have that court reverse or modify the rule laid down in the Ebeling case, and they asked to have a finding made on the facts as to whether the gifts, or any of them, were made in contemplation of death, in order that, if they were successful in securing a change in the rule in the Ebeling case, the matter might be settled without having to come back for a further hearing on the facts.

Under the circumstances, I have concluded to make a finding on the question, on the theory that it can do no harm and if the executors are successful it may save the expense of additional litigation. [fol. 116] The uncontradicted evidence shows that Mr. Schlesinger, up to about fourteen months before his death, was a man of exceptional vigor and good health, giving great attention to and being very much absorbed in his business activities; that in October, 1919, he had an attack of what is commonly known as angina pectoris, but that his physicians and family did not advise him of the nature of his illness for fear that the knowledge would interfere with his state of mind and might prove a hindrance to his ultimate recovery. He himself was persuaded that his trouble was indigestion and that the attacks of pains from which he suffered from time to time were caused by such indigestion. He submitted very unwillingly to the restrictions which his physicians placed upon him and continued to give active attention to his business affairs. He was not advised until the month of November, 1920, that he was suffering from any heart trouble. He left for California on the 30th day of December, 1920, having made arrangements with an hotel in Pasadena for the purchase from it of a bungalow connected with the hotel property, in which he expected to spend the next several winters. He died on the train on his way to California on the 2nd day of January, 1921, of heart failure, caused, it is believed, in part by the high altitude. His age at the time of his death was slightly under seventy, the date of his birth being February 18th, 1851.

It will be observed that all of the gifts or advances to the members of his family were made prior to his first attack of angina pectoris, in October, 1919.

The words "in contemplation of death" as used in our statutes are thus defined:

"It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event accomplish transfers of the [fol. 117] property of decedents in the nature of a testamentary dis-

position. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty." State v. Pabst, 139 Wis. 561.

I am of the opinion that none of the gifts of Mr. Schlesinger to members of his family, made within six years prior to his death, were made in contemplation of death as above defined, and have, therefore, made a finding to that effect.

Such a finding is, as above indicated, entirely immaterial and nugatory, unless counsel for the executors can persuade the Supreme Court to change the rule in State vs. Ebeling. The finding is made solely for the purpose of enabling the question to be presented with the minimum of litigation and expense, and upon the assurance of counsel that it is their intention to seriously present the question of the constitutionality of the statute again to the Supreme Court upon appeal in this case.

For the foregoing reasons, I have made findings as follows:

[fol. 118] Findings

First. I find that the clear market value of common stock in the Steel & Tube Company or America on the 2nd day of January, 1921, the date of Mr. Schlesinger's death, was the sum of $11.00 per share.

Second. I find that the clear market value of common stock in the Newport Company at the date of Mr. Schlesinger's death, January 2, 1921, was $1.6938 per share.

Third. I find that within six years prior to his death the decedent made transfers to his wife and children of stock in the Steel & Tube Company of America and in the Newport Company, or of stock which was subsequently, by the donees, exchanged for stock in those companies, as follows:

(a) To Mathilde Schlesinger, wife:

12 27 16.	1,956 sh. Newport Mining Co. Common.	Exchanged for	75,920.14 sh.
		Steel & Tube Co. of Am. and The Newport Co.	43,759.10 sh.

(b) To Armin A. Schlesinger, Son:

12 27 16.	1,511 sh. Newport Mining Co. Common.	Exchanged for	58,648.14 sh.
		Steel & Tube Co. of Am. and The Newport Co.	33,803.70 sh.
10 1 19.	73,465 sh. Steel & Tube Co. of Am. Common.		
10 1 19.	41,643.12 " The Newport Co. Common.		

(c) To H. J. Schlesinger, Son:

12 27 16.	1,511 sh. Newport Mining Co. Common.	Exchanged for	58,648.14 sh.
		Steel & Tube Co. of Am. and The Newport Co.	33,803.70 sh.
10 1 19.	73,465 sh. Steel & Tube Co. of Am. Common.		
10 1 19.	41,643.12 " The New Port Co. Common.		

[fol. 119] (d) To Gertrude MacLaren, Daughter:

12 27 16.	1,511 sh. Newport Mining Co. Common.	Exchanged for	58,648.00 sh.
		Steel & Tube Co. of Am. and The Newport Co.	33,803.72 sh.
10 1 19.	73,465 sh. Steel & Tube Co. of Am. Common.		
10/ 1/19.	41,643.12 " The Newport Co. Common.		

Fourth. I find that within six years of decedent's death he made transfers to his wife and children of stock in the Milwaukee Coke & Gas Company, Harrow Spring Company and Detroit Iron & Steel Company, as hereinafter specifically set out, which said stock was by the recipients sold and cash received therefor as shown below:

	(a) To Mathilde Schesinger, Wife:			
12 27 16.	1,218 sh. Milwaukee Coke & Gas Co. Common.	Sold for		$121,800.00
12 27 16.	4,701 sh. Harrow Spring Co. Common.	Sold for		30,047.00
12 27 16.	554 sh. Detroit Iron & Steel Co. Pref.	Sold for		5,540.00
12 27 16.	951 sh. Detroit Iron & Steel Co. Com.	Sold for		19,020.00
	(b) To Armin A. Schesinger, Son:			
12 27 16.	863 sh. Milwaukee Coke & Gas Co. Common.	Sold for		$86,300.00
12 27 16.	3,333 sh. Harrow Spring Co. Common.	Sold for		21,304.00
12 27 16.	392 sh. Detroit Iron & Steel Co. Pref.	Sold for		3,920.00
12 27 16.	674 sh. Detroit Iron & Steel Co. Com.	Sold for		13,480.00
	(c) To H. J. Schlesinger, Son:			
12 27 16.	863 sh. Milwaukee Coke & Gas Co. Common.	Sold for		$86,300.00
12 27 16.	3,333 sh. Harrow Spring Co. Common.	Sold for		21,304.00
12 27 16.	392 sh. Detroit Iron & Steel Co. Pref.	Sold for		3,920.00
12 27 16.	674 sh. Detroit Iron & Steel Co. Com.	Sold for		13,480.00
[fol. 120]	(d) To Gertrude MacLaren, Daughter:			
12 27 16.	863 sh. Milwaukee Coke & Gas Co. Common.	Sold for		$86,300.00
12 27 16.	3,333 sh. Harrow Spring Co. Common.	Sold for		21,303.26
12 27 16.	392 sh. Detroit Iron & Steel Co. Pref.	Sold for		3,920.00
12 27 16.	674 sh. Detroit Iron & Steel Co. Com.	Sold for		13,480.00

Fifth. I find that within six years prior to decedent's death he made transfers of cash to his wife and children as follows:

(a)	To Mathilde Schlesinger	$30,124.40
(b)	" Armin A. Schlesinger	10,217.73
(c)	" H. J. Schlesinger	51,882.82
(d)	" Gertrude MacLaren	36,000.00
	Gertrude MacLaren	49,619.09

Sixth. I find that more than six years prior to the decedent's death he made transfers in cash to his wife and two sons as follows:

(a)	To Mathilde Schlesinger	$32,582.32
(b)	" Armin A. Schlesinger	4,980.50
	Armin A. Schlesinger	250,274.90
(c)	" H. J. Schlesinger	34,493.62

I find that the transfers so made were not made in contemplation of death, and are not transfers which should be appraised for the purpose of inheritance tax.

Seventh. I find that the transfers made by the decedent to his wife and children within six years prior to his death, as set forth in findings third to fifth inclusive, were not made in contemplation of death, but are subject to the inheritance tax, and such transfers are to be appraised at the values hereinbefore found.

[fols. 121 & 122] Eighth. I find the clear market value of the other items contained in the inventory, and not in these findings hereinbefore specifically mentioned, to be the sums set opposite the respective items in the appraisal by me made and hereto attached.

Pursuant to the foregoing findings, I have appraised the clear market value of the estate of the decedent, and of any transfer or transfers of property made by the decedent, subject to the inheritance tax as shown by the itemized appraisal hereto affixed.

Dated, Milwaukee, August 8th, 1922.

Respectfully submitted, Jackson B. Kemper, Special Appraiser.

[fol. 123] Transfers Subject to the Inheritance Tax

To Mrs. Mathilde Schlesinger, decedent's wife, on the 27th of December, 1916, 1,956 shares of Newport Mining Company stock, subsequently exchanged by her for 75,290.14 shares of Steel & Tube Company of America, common, appraised at	$828,191.54
Also 43,759.10 shares The Newport Company, common, appraised at	74,119.16

On the same date the decedent made transfers to Mrs. Schlesinger of the following stocks, which were sold for the amounts set after them respectively, and are appraised at the amounts for which they were actually sold, to wit:

1218 shares	Milwaukee Coke & Gas Co., common...	121,800.00
4701 "	Harrow Spring Company, common....	30,047.00
554 "	Detroit Iron & Steel Co., Pfd.....	5,540.00
951 "	" " " " " Common.....	19,020.00
	Cash advanced to Mrs. Schlesinger within six years of decedent's death.....	30,124.40
	To Armin A. Schlesinger, a son of decedent, on the 27th day of December, 1916, 1,511 shares of Newport Mining Company stock, subsequently exchanged by him for 58,648.11 shares of Steel & Tube Company of America, common, appraised at..	645,129.54
	Also 33,803.70 shares The Newport Company, common, appraised at.....	57,256.71
	On October 1, 1919, 73,465 shares Steel & Tube Company of America, appraised at.....	808,115.00
[fol.124]	On October 1, 1919, 41,643.12 shares The New Port Company, appraised at.....	70,534.12
	On December 27, 1916, the decedent gave to his son Armin A. Schlesinger the following shares of stock subsequently sold by him at the amounts set after them respectively, and are appraised at the amounts for which they were actually sold, to wit:	
863 shares	Milwaukee Coke & Gas Co., Common...	86,300.00
2333 "	Harrow Spring Company Common....	21,304.00
392 "	Detroit Iron & Steel Co., Pfd.....	3,920.00
674 "	" " " " " Common.....	13,480.00
	Cash given by decedent to Armin A. Schlesinger within six years of decedent's death.....	10,217.73
	To Henry J. Schlesinger, a son of decedent, on the 27th day of December, 1916, 1,511 shares of Newport Mining Company stock, subsequently exchanged by him for 58,648.11 shares of Steel & Tube Company of America, common, appraised at..	645,129.54
	Also 33,803.70 shares The Newport Company, common, appraised at.....	57,256.71
	On October 1, 1919, 73,465 shares Steel & Tube Company of America, appraised at.....	808,115.00
	On October 1, 1919, 41,643.12 shares The Newport Company, appraised at.....	70,534.12
	On December 27, 1916, the decedent gave to his son Henry J. Schlesinger the following shares of stock subsequently sold by him at the amounts set after them respectively, and are appraised at the amounts for which they were actually sold, to wit:	
863 shares	Milwaukee Coke & Gas Co., Common..	86,300.00
2333 "	Harrow Spring Company, Common....	21,304.00
392 "	Detroit Iron & Steel Co., Pfd.....	3,920.00
674 "	" " " " " Common.....	13,480.00

Cash given by decedent to Henry J. Schlesinger within six years of decedent's death	51,882.82
To Gertrude MacLaren, a daughter of decendent, on the 27th day of December, 1916, 1,511 shares of Newport Mining Company stock, subsequently exchanged by her for 58,648.00 shares of Steel & Tube Company of America, common, appraised at	645,128.00
Also 33,803.72 shares the Newport Company, common, appraised at	57,256.74
On October 1, 1919, 73,465 shares Steel & Tube [fol. 125] Company of America, appraised at	808,115.00
On October 1, 1919, 41,643.12 shares The Newport Company, appraised at	70,534.12

On December 27, 1916, the decedent gave to his daughter, Gertrude MacLaren the following shares of stock subsequently sold by him at the amounts set after them respectively, and are appraised at the amounts for which they were actually sold, to wit:

863	shares	Milwaukee Coke & Gas Co., Common	86,300.00
3333	"	Harrow Spring Company, Common	21,304.00
392	"	Detroit Iron & Steel Co., Pfd.	3,920.00
674	"	" " " " " Common	13,480.00
Cash advanced by decedent to Gertrude MacLaren within six years of decedent's death			36,000.00
and			49,619.09

[fol. 126] [File endorsement omitted.]

[fol. 127] In County Court of Milwaukee County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed County Court March 24, 1923; Supreme Court, December 29, 1923

The petition of Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, the sole acting executors of the Estate of Ferdinand Schlesinger, deceased, setting forth the amounts of the assets and liabilities, and expenses of administration and the condition of said estate, and the amounts of gifts made by the decedent to members of his family within six years prior to his decease, and alleging that none of said gifts were as a matter of fact made in contemplation of death and that the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, which provides that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1, and

Article VIII, Section 1 of the Constitution of Wisconsin, and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and representing that there are collectible debts due the estate which have not yet been collected and cannot be collected for at least one year from the present time and that until the collection of such debts the petitioners will not have funds sufficient to pay the debts of the estate, and that it is not possible at the present time to proceed to the final settlement of said estate; that the inheritance taxes due from said estate as estimated by the petitioners have been paid, but have not yet been definitely fixed and determined by this court, and that it is important that the inheritance taxes upon the various legacies, gifts and transfers above mentioned should be so fixed and determined in order that any bal-
[fol. 128] ances due thereon may be paid and the running of interest on such balances may cease; and praying for an order extending for a period of one year the time within which the petitioners shall pay the debts and legacies and make a final settlement of the estate and of their accounts as such executors; and also for an order fixing a time and place for the determination and adjudication of the inheritance taxes payable in said estate, without waiting for such final settlement of said estate; having duly come on to be heard before this Court at a regular term of the Court held at the Court House in the City of Milwaukee, commencing on the first Tuesday of January, 1923, and on the 18th day of January in said term, pursuant to the order of this Court made in said matter on the 8th day of December, 1922;

Present and presiding the Honorable John C. Karel, County Judge, Messrs. Fawsett & Smart, appearing for the petitioners; George E. Ballhorn, appearing as guardian ad litem for Eileen Schlesinger, Armin Schlesinger, Robert Schlesinger, Gordon MacLaren, Mary MacLaren, and Douglas MacLaren, minors interested in said estate; John Harrington, Counsel for the Wisconsin Tax Commission, and Neele B. Neelen, Public Administrator of said County, appearing for the State of Wisconsin and County of Milwaukee;

And it satisfactorily appearing to the Court that due notice of the time and place of hearing of said petition has been given for three successive weeks by publication of a copy of said order of December 8th, 1922, pursuant to the Statutes and the terms of said order, and by mailing a copy of said order to the Tax Commission of said State and to the Public Administrator of said County twenty days before said hearing;

[fol. 129] And evidence having been offered and witnesses examined in open court, and counsel for petitioners having offered in evidence the evidence taken before the Special Appraiser and returned by him into court together with his Report and findings, and having in open court moved for an order confirming said Report and findings of the Special Appraiser, excepting the finding that the transfers made by the decedent to his wife and children within six years prior to his death as set forth in the Special Appraiser's findings numbered third, fourth and fifth, are subject to the inheritance tax; and having requested the Court to find specifically

upon the evidence that none of the gifts shown to have been made by the decedent to members of his family prior to his death were as a matter of fact made in contemplation of death; and having requested the Court to fix the just and reasonable compensation of the special and general appraisers; of the guardian ad litem; of Edward G. Wilmer, one of the executors named in the will but who having left the State has not for some time taken any active part in the administration of said estate; and of the attorneys for the estate;

And counsel having been heard and the matter submitted;

And the court having made an order extending for a period of one year from the 2nd day of March, 1923, the time within which the petitioners may pay the debts and legacies and make a final settlement of the estate and of their account as such executors, and having made and filed its decision on claims and having allowed as just and valid claims against said estate claims amounting to $1,615,386.66.

The court being now fully advised in the premises hereby confirms and approves in all respects the report, findings and appraisal of said special appraiser, and makes and files its finding of fact and conclusions of law as follows:

I. The findings and appraisal of the said special appraiser, as confirmed and supplemented by the findings and appraisal of the general appraisers, as to the amount and market value at the time [fol. 130] decedent's death, both of the property which he owned at the time of his death as shown by the inventory on file in said matter and of the property which he had transferred without adequate valuable consideration to his wife and children prior to his death as shown in the report, and findings of the said special appraiser, are hereby approved and adopted by the court as its findings, and are hereby made part hereof in all respects as though such findings and appraisal as made by said special and general appraisers were specifically incorporated herein.

II. That none of the gifts made by the decedent more than six years prior to his death were made in contemplation of death, or intended to take effect in possession or enjoyment at or after his death.

III. That none of the gifts made by the decedent within the six years next prior to his death were in fact made in view, or in anticipation, expectation, or apprehension of death, or in the actual contemplation of death as said term "contemplation of death" was used in the statute and had been defined and interpreted by the Supreme Court of Wisconsin prior to the enactment of Chapter 643 of the Laws of 1913; or intended to take effect in possession or enjoyment at or after the death of the decedent; but notwithstanding such facts all of the gifts made by the decedent within the six years next prior to his death must be construed to have been made in contemplation of death within the terms and provisions of Sec. 72.01 (3) of the Wisconsin Statutes.

IV. That the following sums are a just and reasonable compensation for services rendered by the following persons: $5,000.00 for the services of the Special Appraiser; $5,000.00 for the services of the

[fol. 131] General Appraisers; $3,125.00 for the services of Edward G. Wilmer, as one of the executors, under the terms of the will; $2,500.00 for the services of the Guardian ad litem; and $100,000.00 for the services of Fawsett & Smart, the attorneys for the executors of the estate.

And as conclusions of law the Court finds:

I. That none of the gifts referred to in the second of the foregoing findings of fact, made by the decedent to his wife and children more than six years before his death, were made in contemplation of death, or intended to take effect in possession or enjoyment at or after his death, or are subject to inheritance taxes under the Wisconsin Statutes.

II. That the gifts referred to in the third of the foregoing findings of fact, made by the decedent to his wife and children within the six years next prior to his death, are by the express terms of Section 72.01 Clause (3) of the Statutes subject to inheritance taxes, although not in fact made in contemplation of death, which Section of the Statutes, I hold in accordance with the decisions of the Supreme Court of Wisconsin, to be constitutional and valid.

III. That the claims on file against said estate, amounting to $1,615,386.66, which have been allowed by the Court as aforesaid; and the same amounting to $115,625.00 found to be a just and reasonable compensation for services rendered by the persons named in the fourth of the foregoing findings of facts, together with such other reasonable and necessary expenses as are shown to have been incurred by the executors in the administration of said estate; are proper deductions to be made in determining the clear value of the estate at the date of the death of the testator.

[fol. 132] IV. That the finding and determination of the inheritance taxes in said estate are to be made in accordance with the foregoing findings of fact and conclusions of law.

Dated this 24th day of March, 1923.

By the Court.

John C. Karel, County Judge. (Seal Milwaukee County Court, Wisconsin.)

[fol. 133] [File endorsement omitted.]

[fol. 134] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

SUPPLEMENTAL PETITION OF EXECUTORS—Filed County Court April 5, 1923; Supreme Court December 29, 1923

The petition of Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, the sole acting executors of the estate of Ferdinand Schlesinger, deceased, respectfully represents that the annexed is a partial account of their administration of said estate and asks that said account may be filed herewith; that they are not now ready to proceed to a final settlement of said estate and that the time within which the petitioners may pay the debts and legacies and make a final settlement of said estate and of their account as such executors, has been extended for a period of one year from the 2nd day of March, 1923, by an order of this Court, dated said 2nd day of March, 1923; that this account is filed for the purpose of aiding in the determination of the Inheritance Taxes payable in said estate, under findings of fact and conclusions of law, signed and filed upon the 21st day of March, 1923, in the above entitled matter; and these petitioners pray that a time and place be fixed for the examination and allowance of this account and for the determination and adjudication of the Inheritance Tax, if any, payable in said estate.

Dated, Milwaukee, Wisconsin, this 3d day of April, 1923.

Henry J. Schlesinger. Armin A. Schlesinger, per H. J. Schlesinger. Myron T. MacLaren. Fawsett & Smart, Attorneys for the Petitioners.

[fol. 135] Jurat showing the foregoing was duly sworn to by Henry J. Schlesinger, omitted in printing.

[fol. 136] [File endorsement omitted.]

[fol. 137] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

STIPULATION RE VALUATION AND DEDUCTIONS FOR INHERITANCE TAX—Filed County Court, September 11, 1923; Supreme Court, December 29, 1923

Died January 2, 1921.

I hereby consent that the valuation and deductions for inheritance tax purposes in the above entitled estate be as follows:

Value of said estate as per inventory	$2,062,911.65
Additional items added to inventory	961.23
Total	$2,063,872.88

Deductions	1,761,652.57
Clear value for taxable purposes	$299,220.31

Dated August 24th, 1923.

Neele B. Neelen, Public Administrator.

Approved: Wisconsin Tax Commission, by John Harrington, Inh. Tax Counsel.

Tax

Ignore bequest to Mona Schlesinger (daughter-in-law) in item 2 of will, bequest cancelled by codicil.

Mathilda Schlesinger (widow), value of bequest $10,385.00 plus life insurance $40,096.23, not included in inventory; plus $1,085,647.70 stocks of various corporations transferred to widow within six years before the testator's death; plus $30,124.40 gifts of money and of credit within six years before testator's death. Last two items not included in inventory.

Myron T. MacLaren (son-in-law) Item 2 of will, value of bequest $25,000.00

[fol. 138] Kathleen Schlesinger (daughter-in-law) item 2 of will, value of bequest $25,000.00

Item 3 of Will

Meta Eckoff (Stranger) as per will	1,000.00
Margaret Eckoff " " " "	1,000.00
Fred Robinson " " " "	1,000.00
Alfred Robinson " " " "	1,000.00
John Sley " " " "	1,000.00
Wilmot Saeger " " " "	1,000.00
Martha Groskopf " " " "	1,000.00

Item 4 of Will

Milwaukee Children's Hospital Association (charitable)	$50,000.00
Infants' Hospital of Milwaukee "	25,000.00
Associated Charities of Milwaukee "	50,000.00
Visiting Nurses Association of Milwaukee "	25,000.00
Columbia Hospital of Milwaukee "	20,000.00
Centralized Budget of Milwaukee "	80,000.00

Henry J. Schlesinger (son) stocks of various corporations transferred within six years before testator's death, appraised at $1,706,040.31; plus $51,882.82 gifts of money or credit within six years before testator's death and not included in inventory.

Armin A. Schlesinger (son) stocks of various corporation transferred within six years before testator's death, appraised at $1,706,040.31, not included in inventory; plus $10,217.73 gifts of money or credit within six years before testator's death, not included in inventory.

Gertrude MacLaren (daughter) stocks of various corporations transferred with six years before testator's death, appraised at $1,706,038.06 not included in inventory; plus $85,619.09 gifts of money or credit within six years before testator's death not included in inventory.

After the payment of the debts, expenses of administration and of the above mentioned specified legacies to Meta Eckoff et al., and the specific bequests to the various charitable organizations, pursuant to the terms and provisions of the last will and testament of the deceased, the estate will be exhausted and leave nothing for the residuary legatees mentioned in the will and all other provisions mentioned in the will for inheritance tax purposes may be ignored

118 48874

527 80/[174]*
512

[fol. 139] [File endorsement omitted.]

[fol. 140] THE STATE OF WISCONSIN:

COUNTY COURT OF MILWAUKEE COUNTY

FINAL ORDER DETERMINING INHERITANCE TAX—Filed County Court September 11, 1923; Supreme Court, December 29, 1923

[Title omitted]

Upon all the papers, documents, etc., heretofore served or filed in the above entitled matter, and upon all the proceedings heretofore had herein, and the following parties appearing: Henry J. Schlesinger, Armin A. Schlesinger, Myron T. MacLaren and Edward G. Wilmer, executors, in person and by Fawsett & Smart, their attorneys, George E. Ballhorn as guardian ad litem, John Harrington for Wisconsin Tax Commission, Neele B. Neelen, Public Administrator, in person, the Court finds and determines as follows:

That said deceased died on the 3rd day of January, 1921;

That the value of said Estate is $2,063,872.88;

That the deductions under the transfer tax law amount to $1,764,652.57;

That the clear value of said estate as of the date of the death of said testator is $299,220.31 plus gifts made within six years prior to testator's death $6,421,708.90;

That the legatees and devisees, relationship, legacies and devises, exemptions, amounts taxable, rates of taxation and amount of tax are as follows:

[*Figures enclosed in brackets erased in copy.]

Legatees and devisees	Relationship	Legacies and devisees	Amount exempt	Amount taxable	Per cent	Amount of tax
Myron T. MacLaren	Son in law	$23,569.19	$500.00	$23,069.19	2	$461.38
Kathleen Schlesinger	Daughter in law	23,569.19	500.00	23,069.19	2	461.38
Meta Eckoff	Stranger	942.77	100.00	842.77	5	42.14
Margaret Eckoff	Stranger	942.77	100.00	842.77	5	42.14
Fred Robinson	Stranger	942.77	100.00	842.77	5	42.14
Alfred Robinson	Stranger	942.77	100.00	842.77	5	42.14
John Sley	Stranger	942.77	100.00	842.77	5	42.14
Wilmot Saeger	Stranger	942.77	100.00	842.77	5	42.14
Martha Gross-kopf	Stranger	942.77	100.00	842.77	5	42.14
Milwaukee Children's Hospital	Charit. Corp.	47,138.38	All	None		None
Infant's Hospital of Milwaukee	" "	23,569.19	All	None		None
Associated Charities of Milwaukee	" "	47,138.38	All	None		None
Visiting Nurses	" "	23,569.19	All	None		None
Columbia Hospital	" "	18,855.35	All	None		None
Centralized Budget	" "	75,421.41	All	None		None
Mathilda Schlesinger	Widow	1,165,658.97	10,000.00	15,000.00	1	150.00
				25,000.00	2	500.00
				50,000.00	3	1,500.00
				400,000.00	4	16,000.00
				665,658.97	5	33,282.95
Henry J. Schlesinger	Son	1,757,923.13	2,000.00	23,000.00	1	230.00
				25,000.00	2	500.00
				50,000.00	3	1,500.00

Legatees and devisees	Relationship	Legacies and devisees	Amount exempt	Amount taxable	Per cent	Amount of tax
.....	.....	.....	.....	400,000.00	4	16,000.00
.....	.....	.....	.....	1,257,923.13	5	62,896.16
Armin A. Schlesinger	Son	1,716,258.04	2,000.00	23,000.00	1	230.00
.....	.....	.....	.....	25,000.00	2	500.00
.....	.....	.....	.....	50,000.00	3	1,500.00
.....	.....	.....	.....	400,000.00	4	16,000.00
.....	.....	.....	.....	1,216,258.04	5	60,812.90
Gertrude MacLaren	Daughter	1,791,659.40	2,000.00	23,000.00	1	250.00
.....	.....	.....	.....	25,000.00	2	500.00
.....	.....	.....	.....	50,000.00	3	1,500.00
.....	.....	.....	.....	400,000.00	4	16,000.00
.....	.....	.....	.....	1,291,659.40	5	64,582.97
						295,632.72

A payment of $295,739.58 was made on July 1st, 1922.

Dated this 11th day of September, 1923.

By the Court.

John C. Karel, County Judge.

[File endorsement omitted.]

[fol. 141] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

JUDGE'S CERTIFICATE—Filed Dec. 29, 1923

I, John C. Karel, Judge of the Second Division of the County Court of Milwaukee County, Wisconsin, and the Judge before whom the above entitled matter was tried, do hereby certify that the foregoing Petition for proof of will, Order for hearing, Order appointing guardian ad litem, Order admitting will to probate, Will, Codicil and Certificate of Probate thereof, Letters testamentary, Order appointing appraisers, Inventory and appraisal warrant of appraisers and statement of Ante Mortem gifts, Petition and Order, Report, Findings and Appraisal of Jackson B. Kemper, Special Appraiser, Receipt for Inheritance Tax, Tender, Petition of Executors, Notice of hearing, Proof of publication, Decision on claims, Order extending time to pay debts, settlement of estate, etc. Findings of Fact and Conclusions of Law, Petition and partial account, Notice, Proof of publication, Affidavit of mailing order In re inheritance tax, Findings in re inheritance tax, Statement in re Inheritance tax, Notice of appeal from order by the executors and order directing [fol. 142] service of copy of said notice on Inheritance Tax Counsel and the Public Administrator filed November 9th, 1923, Affidavit of service November 10th, 1923, on the Public Administrator filed November 19th, 1923, Admission of service November 10th, 1923 by Inheritance Tax Counsel filed November 19th, 1923, Notice of appeal by Mathilde Schlesinger, undertaking and order directing service of notice and undertaking on the Inheritance Tax Counsel and Public Administrator, filed November 9th, 1923, Affidavit of service November 10th, 1923, on Public Administrator filed November 19th, 1923, Admission of service November 10th, 1923, by Inheritance Tax Counsel, filed November 19th, 1923, Notice of appeal by Armin A. Schlesinger, undertaking on appeal and order directing service on the Inheritance Tax Counsel and the Public Administrator, filed November 9th, 1923, Affidavit of service November 10th, 1923, on Public Administrator, filed November 19th, 1923, Admission of service, November 10th, 1923, by Inheritance Tax Counsel, filed November 19th, 1923, Notice of appeal by Henry J. Schlesinger, undertaking on appeal and order directing service on the Inheritance Tax Counsel and Public Administrator, filed November 9th, 1923, Affidavit of service November 10th, 1923, on Public Administrator, filed November 19th, 1923, Admission of service November 10th, 1923, by Inheritance Tax Counsel, filed November 19th, 1923, Notice of appeal by Gertrude MacLaren, undertaking on appeal and order directing service on the Inheritance Tax Counsel and Public Administrator, filed November 9th, 1923, Affidavit of service November 10th, 1923, on Public Administrator, filed November 19th, 1923, and Admission of service by Inheritance Tax Counsel, filed November 19th, 1923, are the original papers

filed in this court in said matter and that they are transmitted [fol. 143] pursuant to the appeal of Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, executors, Mathilde Schlesinger, widow, Henry J. Schlesinger, Gertrude MacLaren and Armin Schlesinger to the Supreme Court of the State of Wisconsin from said judgment and the whole thereof.

Witness my hand and the seal of the County Court of Milwaukee County, Wisconsin, this 24th, day of December, 1923.

John C. Karel, County Judge. (Seal Milwaukee County Court, Wisconsin.)

[fol. 144] [File endorsement omitted.]

[fol. 145] In County Court of Milwaukee County

[Title omitted]

Stipulation re Bill of Exceptions—Filed in County Court January 3, 1924; January 10, 1924, Supreme Court

It is hereby mutually stipulated and agreed that but one bill of exceptions shall be settled and signed in the above entitled matter, and that one record shall be returned to the Supreme Court to be used upon all of said appeals.

It is further stipulated and agreed that the bill of exceptions, together with this stipulation, may be returned to the Supreme Court as a supplemental return upon said appeals.

Dated this 24th day of December, 1923.

Fawsett & Smart, Attorneys for All the Above-named Appellants. H. L. Ekern, Attorney General, and Franklin E. Bump, Assistant Attorney General, Appearing for State of Wisconsin. Neele B. Neelen, Public Administrator of the County of Milwaukee.

[fol. 146] [File endorsement omitted.]

[fol. 147] In County Court of Milwaukee County

[Title omitted]

Stipulation re Bill of Exceptions—Filed January 10, 1923

Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, executors of said estate; Mathilde Schlesinger, the widow, and Armin A. Schlesinger, Henry J. Schlesinger and Gertrude

MacLaren, children of said decedent, having appealed to the Supreme Court of Wisconsin from the order, finding and determination of the County Court of said County made and filed in the above entitled matter on the 11th day of September, 1923, fixing and determining the amount of inheritance taxes due and payable in said estate.

It is hereby mutually stipulated and agreed that the annexed bill of exceptions may be settled and signed by the Judge of said County Court by whom the matters involved in said order, finding and determination in said appeals were heard and tried, as the bill of exceptions in said matter for use upon said appeals without further notice by any party,

Dated this 20th day of December, 1923.

Fawsett & Smart, Attorneys for the Executors and the Above-
[fol. 148] named Appellants. Herman L. Ekin, Attorney General; Franklin E. Bump, Assistant Attorney General, Attorneys for the Wisconsin Tax Commission and for the State of Wisconsin. Neele B. Neelen, Public Administrator of the County of Milwaukee.

[File endorsement omitted.]

[fol. 149] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

BILL OF EXCEPTIONS—Filed in County Court January 3, 1924; Supreme Court January 10, 1924.

CAPTION

Be it remembered that the petition of Henry J. Schlesinger, Armin A. Schlesinger and Myron T. MacLaren, executors of the last will and testament of the above named Ferdinand Schlesinger, deceased, filed on the 8th day of December, 1922, praying for an order extending for a period of one year the time within which said petitioners should pay the debts and legacies and make a final settlement of the estate and of their account as such executors, and fixing a time and place for the hearing of said petition; and also for an order fixing the time and place for the determination and adjudication of the inheritance taxes payable in said estate without waiting for such final settlemen of said estate; duly came on for hearing before said court at a regular term of said court held at the courthouse in the city of Milwaukee, commencing on the first Tuesday of January, 1923, and on the 18th day of January in said term, pursuant to the order of the court made and filed in said matter on the 8th day of December, 1922;

[fol. 150] Present and presiding the Honorable John C. Karel,

County Judge; Fawsett & Smart appearing for the petitioners, and for Mathilde Schlesinger, widow of the decedent, and Armin A. Schlesinger, Henry J. Schlesinger and Gertrude MacLaren, children of the decedent; George E. Ballhorn appearing as guardian ad litem for Eileen Schlesinger, Armin Schlesinger, Robert Schlesinger, Gordon MacLaren, Mary MacLaren and Douglas MacLaren, minors interested in said estate; John Harrington, Inheritance Tax Counsel for the Wisconsin Tax Commission, appearing for the Tax Commission and the State of Wisconsin; and Neele B. Neelen, Public Administrator of said county, appearing for the county of Milwaukee;

And evidence having been offered and witnesses examined in open court by both parties, and counsel having been heard and the matter submitted, and the same having been taken under advisement by the court;

The petitioners, Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, as executors of the estate of said Ferdinand Schlesinger, deceased, presented to the court on the 2nd day of March, 1923 and filed, and requested the court to make and find the following several findings of facts and conclusions of law, to-wit:

[fol. 151] [Title omitted]

REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now come Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, the sole acting executors of the estate of Ferdinand Schlesinger, deceased, and request the court to make and find the several findings of fact and conclusions of law hereto attached.

Fawsett and Smart, Attorneys for the Above-named Executors.

Dated March 1st, 1923.

[fol. 152] [Title omitted]

The petition of Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, the sole acting executors of the estate of Ferdinand Schlesinger, deceased, setting forth the amounts of the assets and liabilities, and expenses of administration and the condition of said estate, and the amounts of gifts made by the decedent to members of his family within six years prior to his decease, and alleging that none of said gifts were as a matter of fact made in contemplation of death and that the provisions of Section 72.01 Clause (3) of the Wisconsin Statutes, which provides that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1, and Article VIII, Section 1 of the Constitution of Wisconsin, and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and representing that there are collectible debts due the estate which have

not yet been collected and cannot be collected for at least one year from the present time and that until the collection of such debts the petitioners will not have funds sufficient to pay the debts of the estate, and that it is not possible at the present time to proceed to the final settlement of said estate; that the inheritance taxes due from said estate as estimated by the petitioners have been paid, but have not yet been definitely fixed and determined by this court, and [fol. 153] that it is important that the inheritance taxes upon the various legacies, gifts and transfers above mentioned should be so fixed and determined in order that any balances due thereon may be paid and the running of interest on such balances may cease; and praying for an order extending for a period of one year the time within which the petitioners shall pay the debts and legacies and make a final settlement of the estate and of their account as such executors; and also for an order fixing a time and place for the determination and adjudication of the inheritance taxes payable in said estate, without waiting for such final settlement of said estate; having duly come on to be heard before this Court at a regular term of the Court held at the Court House in the City of Milwaukee, commencing on the first Tuesday of January 1923, and on the 18th day of January in said term, pursuant to the order of this Court made in said matter on the 8th day of December, 1922;

Present and presiding the Honorable John C. Karel, County Judge; Messrs. Fawcett & Smart, appearing for the petitioners; George E. Ballhorn appearing as guardian ad litem for Eileen Schlesinger, Armin Schlesinger, Robert Schlesinger, Gordon MacLaren, Mary MacLaren and Douglas MacLaren, minors interested in said estate; John Harrington, Counsel for the Wisconsin Tax Commission, and Neele B. Neelen, Public Administrator of said County, appearing for the State of Wisconsin and County of Milwaukee;

And it satisfactorily appearing to the Court that due notice of the time and place of hearing of said petition has been given for three successive weeks by publication of a copy of said order of December 8th, 1922, pursuant to the Statutes and the terms of [fol. 154] said order, and by mailing a copy of said order to the Tax Commission of said State and to the Public Administrator of said County twenty days before said hearing;

And evidence having been offered and witnesses examined in open court, and counsel for petitioners having offered in evidence the evidence taken before the Special Appraiser and returned by him into court together with his Report and findings, and having in open court moved for an order confirming said Report and findings of the Special Appraiser, excepting the finding that the transfers made by the decedent to his wife and children within six years prior to his death as set forth in the Special Appraiser's findings numbered third, fourth and fifth, are subject to the inheritance tax; and having requested the Court to find specifically upon the evidence that none of the gifts shown to have been made by the decedent to members of his family prior to his death were as a matter of fact made in contemplation of death; and having requested the Court to fix the just and reasonable compensation of the special and general

appraisers: of the guardian ad litem: of Edward G. Wilmer, one of the executors named in the will but who having left the State has not for some time taken any active part in the administration of said estate; and of the attorneys for the estate;

And counsel having been heard and the matter submitted;

And the court having made an order extending for a period of one year from the 2nd day of March, 1923, the time within which the petitioners may pay the debts and legacies and make a final settlement of the estate and of their account as such executors, and having made and filed its decision on claims and having allowed as just and valid claims against said estate claims amounting to $1,615,386.66. [fol. 155] The court being now fully advised in the premises hereby confirms and approves in all respects the report, findings and appraisal of said Special Appraiser, excepting the finding that the transfers made by the decedent to his wife and children within six years prior to his death, as set forth in the Special Appraiser's findings numbered third, fourth and fifth, are subject to the inheritance tax, and makes and files its findings of facts and conclusions of law as follows:

I. The findings and appraisal of the said Special Appraiser, as confirmed and supplemented by the findings and appraisal of the General Appraisers, as to the amount and market value at the time of decedent's death, both of the property which he owned at the time of his death as shown by the inventory on file in said matter and of the property which he had transferred without adequate valuable consideration to his wife and children prior to his death as shown in the report and findings of the Special Appraiser, are hereby approved and adopted by the court as its findings, and are hereby made part hereof in all respects as though such findings and appraisal as made by said Special and General Appraisers were specifically incorporated herein.

II. That none of the gifts made by the decedent more than six years prior to his death were made in contemplation of death, or intended to take effect in possession or enjoyment at or after his death.

III. That none of the gifts made by the decedent within the six years next prior to his death were made in view, or in anticipation, expectation, or apprehension of death, or in the actual contemplation of death, or in contemplation of death, as said term "contempla- [fol. 156] tion of death" was used in the Statute and had been defined and interpreted by the Supreme Court of Wisconsin prior to the enactment of Chapter 643 of the Laws of 1913, or intended to take effect in possession or enjoyment at or after the death of the decedent.

IV. That the following sums are a just and reasonable compensation for services rendered by the following persons: $5,000.00 for the services of the Special Appraiser; $5,000.00 for the services of the General Appraisers; $3,125.00 for the services of Edward G.

Wilmer, as one of the executors, under the terms of the will; $2,500.00 for the services of the Guardian ad litem; and $100,000.00 for the services of Fawsett and Smart, the attorneys for the executors of the estate.

And as conslusions of law the Court finds:

I. That none of the gifts referred to in the second of the foregoing findings of fact, made by the decedent to his wife and children more than six years before his death, were made in contemplation of death, or intended to take effect in possession or enjoyment at or after his death or are subject to inheritance taxes under the Wisconsin Statutes.

II. That the gifts referred to in the third of the foregoing findings of fact, made by the decedent to his wife and children within the six years next prior to his death, are not subject to the inheritance tax, and that the provisions of Section 72.01 Clause (3) of the Statutes prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1, and Article VIII, Section 1, of the Constitution of Wisconsin and as being in conflict with and in violation of Section [fol. 157] 1 of the Fourteenth Amendment to the Constitution of the United States.

III. That the claims on file against said estate, amounting to $1,615,386.66, which have been allowed by the Court as aforesaid; and the sums amounting to $115,625.00 found to be a just and reasonable compensation for services rendered by the persons named in the fourth of the foregoing findings of facts; together with such other reasonable and necessary expenses as are shown to have been incurred by the executors in the administration of said estate; are proper deductions to be made in determining the clear value of the estate at the date of the death of the testator.

IV. That the finding and determination of the inheritance taxes in said estate are to be made in accordance with the foregoing findings of fact and conclusions of law.

By the Court.

—— ——, County Judge.

Dated this — day of ——, 1923.

[fol. 158] [File endorsement omitted.]

[fol. 159] That the court refused to adopt the second conclusion of law so requested by the executors to be made and found by the court, and refused to adopt any of the other of said requested findings of fact and conclusions of law except as the same are embodied in its findings of facts and conclusions of law made and filed in said matter on the 24th of March, 1923.

That thereafter the further and supplemental petition together with a partial account of their administration of said estate, filed by said executors on the 5th day of April, 1923, for the purpose of aiding in the determination of the inheritance taxes payable in said estate under the findings of fact and conclusions of law made and filed by the Court on the 24th day of March, 1923, as aforesaid, duly came on for hearing before the Court at a regular term of said Court begun and held on the first Tuesday of May, 1923, to-wit, on the 22nd day of May, 1923 in said term, pursuant to the order of the Court made and filed in said matter on the 5th day of April, 1923;

Present and presiding the Honorable John C. Karel, County Judge;

Fawsett & Smart appearing for the petitioners and for the widow and children of decedent; George E. Ballhorn as guardian ad litem appearing for the minors hereinabove named; John Harrington, Inheritance Tax Counsel, appearing for the Tax Commission and the State of Wisconsin; and Neele B. Neelen, Public Administrator, appearing for the County of Milwaukee;

[fol. 160] And evidence having been offered in reference to the last mentioned petition and the account filed therewith, and counsel having been heard and the matter having been submitted; and the court, being duly advised in the premises, having thereafter on the 11th day of September, 1923, made and filed its order, finding and determination fixing the inheritance taxes due in said estate in accordance with the requirements of its findings of facts and conclusions of law so filed by it on the 24th day of March, 1923, as aforesaid;

The said Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, as executors of said estate, by their attorneys, on the 21st day of September, 1923, filed the following written exceptions:

[fol. 161] [Title omitted]

EXCEPTIONS OF EXECUTORS

Now come Armin A. Schlesinger, Henry J. Schlesinger and Myron T. MacLaren, sole acting executors of the estate of the above named Ferdinand Schlesinger, Deceased, and except to the refusal of the court to make and find the second conclusion of law requested by said executors to be made and found in the above entitled matter, which refers to certain gifts made by the decedent to his wife and children within the six years next prior to his death.

Said executors also except to that part of the third of the findings of fact made and filed by the court in the above entitled matter which finds that notwithstanding the facts set forth in the preceding portion of said third finding of facts all of the gifts made by the decedent within the six years next prior to his death must be construed to have been made in contemplation of death within the terms and provisions of Section 72.01 Clause (3) of the Wisconsin Statutes.

They further except to that portion of the second of the conclu-

[fol. 162] sions of law made and filed by the court in the above entitled matter which reads as follows:

"That the gifts referred to in the third of the foregoing findings of fact, made by the decedent to his wife and children within the six years next prior to his death are by the express terms of Section 72.01 Clause (3) of the statutes subject to inheritance taxes, although not in fact made in contemplation of death."

They except also to that portion of said second conclusion of law which reads as follows:

"Which section of the statutes I hold to be constitutional and valid."

They further except to the fourth of said conclusions of law so far as the same directs that the finding and determination of the inheritance taxes in said estate are to be made in accordance with any of the provisions of said findings of fact and conclusions of law to which the foregoing exceptions are taken.

They also except to that portion of the order made and filed on the 11th day of September, 1923, which finds and determines that the gifts made by the decedent within six years prior to his death are subject to an inheritance tax and fixes the amount of such tax for the reason that the provisions of Section 72.01 Clause (3) of the Statutes [fol. 163] prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section I, and Article VIII, Section I, of the Constitution of Wisconsin and as being in conflict with and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

Dated September 21, 1923.

Fawsett & Smart, Attorneys for the Executors.

[fols. 164 & 165] [File endorsement omitted.]

[fol. 166] [Title omitted]

EXCEPTIONS OF MATHILDE SCHLESINGER

Now comes Mathilde Schlesinger, the widow of the above named decedent by Fawsett & Smart, her attorneys, and excepts to the refusal of the court to make and find the second conclusion of law requested by the executors of said estate to be made and found in the above entitled matter so far as the same refers to gifts made by the decedent to said Mathilde Schlesinger within the six years next prior to his death.

She also excepts to that part of the third of the findings of fact made and filed by the court in the above entitled matter which finds that notwithstanding the facts set forth in preceding portions of said third finding of fact, all of the gifts made by the decedent within the six years next prior to his death to the said Mathilde Schlesinger must be construed to have been made in contemplation of death within the terms and provisions of Section 72.01 Clause (3) of the Wisconsin Statutes.

[fol. 167] She also excepts to that portion of the second of the conclusions of law made and filed by the court in the above entitled matter, which reads as follows:

"That the gifts referred to in the third of the foregoing findings of fact made by the decedent to his wife and children within the six years next prior to his death are by the express terms of Section 72.01 Clause (3) of the Statutes subject to inheritance taxes although not in fact made in contemplation of death."

so far as said portion of said conclusion of law refers to gifts made by the decedent to the said Mathilde Schlesinger within the six years next prior to his death.

She also excepts to that portion of said second conclusion of law which reads as follows:

"Which section of the statutes I hold to be constitutional and valid."

She also excepts to the fourth of said conclusions of law so far as the same directs that the finding and determination of the inheritance taxes in said estate are to be made in accordance with any of the provisions of said findings of fact and conclusions of law to which the foregoing exceptions are taken.

She also excepts to that portion of the order made and filed on the 11th day of September, 1923, which finds and determines that the gifts made to her by the decedent within six years prior to his death are subject to an inheritance tax and fixes the amount of such tax for the reason that the provisions of Section 72.01 Clause (3) of the [fol. 168] Statutes prescribing that such gifts shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of death are invalid, unconstitutional and void as being in conflict with and in violation of Article I, Section 1, and Article VIII, Section 1, of the Constitution of Wisconsin and as being in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Dated September 21, 1923.

Fawsett & Smart, Attorneys for Mathilde Schlesinger.

[fols. 169-184] [File endorsement omitted.]

[fol. 185] IN COUNTY COURT OF MILWAUKEE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

And because the foregoing requests for findings of facts and conclusions of law to be made and filed by the court in the above entitled matter, and the foregoing exceptions do not appear of record, I, the undersigned, the County Judge who heard and tried the matters above referred to, have upon the annexed stipulation of counsel settled and signed this bill of exceptions to the end that the same be made part of the record herein this 3rd day of January, 1924.

John C. Karel, County Judge.

[fol. 186] [File endorsement omitted.]

[fol. 187] IN COUNTY COURT OF MILWAUKEE COUNTY

[Title omitted]

JUDGE'S CERTIFICATE—Filed Jan. 10, 1924, Supreme Court

STATE OF WISCONSIN,
Milwaukee County, ss:

I, John C. Karel, Judge of the Second Division of the County Court of Milwaukee County, Wisconsin, and the Judge before whom the above entitled matter was tried, do hereby certify that the annexed and foregoing are the original stipulation and bill of exceptions filed and entered in the above entitled matter, and that the same are hereby transmitted to the Supreme Court of the State of Wisconsin, pursuant to notice of appeal herein, and supplemental to the return heretofore made.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of January, 1924.

John C. Karel, County Judge. (Seal Milwaukee County Court, Wisconsin.)

[fol. 188] [File endorsement omitted.]

[fol. 189] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ARGUMENT AND SUBMISSION—March 14, 1924

And now at this day came the parties herein by their attorneys, and this cause having been argued by Charles F. Fawsett, Esq., for

the appellants, and by Franklin E. Bump, Esq., Assistant Attorney General, for the respondents, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 190 & 191] IN SUPREME COURT OF WISCONSIN

[Title omitted]

JUDGMENT—May 6, 1924

This cause came on to be heard on appeal from the order of the County Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the County Court of Milwaukee County, appealed from in this cause, be, and the same is hereby affirmed with costs against the said appellants.

Justice Eschweiler dissents.

[fol. 192] IN SUPREME COURT OF WISCONSIN

[Title omitted]

OPINION—Filed May 6, 1924

Appeals from order of the County court of Milwaukee county: John C. Karel, County Judge. Affirmed.

On the third day of January 1921, Ferdinand Schlesinger died testate, leaving a large estate. He also left surviving him a widow, two sons and a daughter, who among others, were legatees under the will of the deceased. It appears from the testimony that within six years of the date of his death the testator made gifts set out in the third finding of fact to his wife, two sons, and daughter, as follows:

Gifts to Mrs. Schlesinger	$1,115,772.10
Henry J. Schlesinger	1,757,923.13
Armin A. Schesinger	1,716,258.04
Gertrude MacLaren	1,791,657.15

As to these gifts the county court made the following finding of fact: "That none of the gifts made by the decedent within six years next prior to his death were in fact made in view, or in anticipation, expectation, or apprehension of death, or in the actual contemplation of death as said term 'contemplation of death' was used in the statute and had been defined and interpreted by the Supreme Court of Wisconsin prior to the enactment of Chapter 643 of the Laws of 1913;

or intended to take effect in possession or enjoyment at or after the death of the decedent; but notwithstanding such facts all of the gifts made by the decedent within the six years next prior to his death must be construed to have been made in contemplation of death [fol. 193] within the terms and provisions of Sec. 72.01 of the Wisconsin Statutes." His conclusion of law was as follows: "That the gifts referred to in the third of the foregoing findings of fact, made by the decedent to his wife and children within the six years next prior to his death, are by the express terms of Sec. 72.01, Clause (3) of the Statutes subject to inheritance taxes, although not in fact made in contemplation of death, which Section of the Statutes, I hold in accordance with the decisions of the Supreme Court of Wisconsin, to be constitutional and valid." From an order holding the gifts taxable under the provisions of Sec. 72.01 Subd. 3 of the statutes the executors and heirs appealed.

[fol. 194] VINJE, C. J.:

The appellants in their brief say "The only provision of the inheritance tax law to which exception is taken is that part of Section 72.01, clause (3) of the Wisconsin statutes, which was added by Chapter 643 of the Laws of 1913 reading as follows: "Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

The validity of this law is sustained in the case of Estate of Ebeling, 169 Wis. 432 which decision we are asked to overrule, because it is a recent one and not firmly grounded in the rule of stare decisis, and because objections to its constitutionality are now presented that were not before the court in the Ebeling case. It is true that a number of claims of unconstitutionality in the law are now made that were not urged in the Ebeling case, or if urged, took a different form and were not perhaps dealt with in detail in that opinion. The brief and argument in the present case cogently and clearly set forth the view of counsel and express as forcibly as can be the grounds urged. We take it both from the contents of the briefs and from statements made upon the oral argument that a tax upon gifts actually made in contemplation of death are conceded to be valid, and that objection is made only to that part of the law above set out that taxes all gifts within six years of the donor's death whether made in contemplation of death or not.

[fol. 195] The chief objection made to the validity of the law and the only ones we shall specifically deal with in this opinion may be summarized as follows:

1. The statute taxing gifts made within six years of donor's death is void because it lacks certainty. There is no certainty: (a) that the tax will ever be levied, or (b) if levied, what the amount of the

tax will be, or what the rate will be. It is claimed there must be certainty in tax levies.

2. The basis of classification is wrong. One class consists of gifts actually made in contemplation of death; another of gifts made within six years of death but not necessarily in contemplation thereof, so that the class consists of two different kinds of gifts, one made in contemplation of death and one within six years of the death of the donor. Members of the same class it is claimed must be substantially similar in kind.

3. If a gift made within six years of the donor's death is not made in contemplation of death the legislature cannot make it so. An existing fact cannot be substantially changed by a legislative fiat.

4. The tax cannot be justified as a tax upon gifts inter vivos alone. The classification is wrong.

In considering the various objections made to the law it should be borne in mind that the tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law. Knowlton v. Moore, 178 U. S. 41. In the imposition of excise taxes greater latitude is permitted both in classification and in enforcement because of the difficulty of classifying and enforcing as compared with property or a direct tax.

[fol. 196] It is said that when the gift is made there is no certainty that a tax will ever be levied for if the donor survives for six years or more and the gift was not made in contemplation of death it is not taxable. That is true, but the same uncertainty may attach to a gift made ten years before death. It may be a matter for judicial determination whether the gift was made in contemplation of death. If it was it is taxable, if not it is not taxable. The donee of such a gift may have no reason to believe at the time it is received or at any time thereafter that it was made in contemplation of death and yet such may have been the fact. As to gifts made within six years their status at the time the tax is claimed is certain and fixed. That of gifts made previously is a subject of proof and perhaps of uncertainty till the court of last resort has passed upon whether or not they were made in contemplation of death. Personal property may be located in a certain taxing district of the state. It is not certain that a tax will have to be paid upon it the following year. It may be destroyed by fire or otherwise, or it may be moved out of the state before the tax is assessed. Life and law are full of uncertainties. There is no constitutional provision that at any given time all things must be certain. Contingencies are constantly dealt with in law. When the donor's estate is settled uncertainties as to the levy of the tax, the amount thereof and the rate are reduced to certainties, and that is all the law requires.

The second objection that the basis of classification is wrong because there are two classes, one of gifts made in contemplation of death and another of gifts made within six years though not in contemplation of death misinterprets the legislative intent. Such intent was to tax only gifts made in contemplation of death. That is the

[fol. 197] only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death, bringing such gifts within the only class created, namely, gifts made in contemplation of death. Waiving the question of whether the legislature could bring gifts made within six years within the class it is quite obvious that only one class is created and that a valid one, for gifts made in contemplation of death stand upon a different basis than ordinary gifts made inter vivos. It was the former the legislature sought to reach in order to insure a reasonably effective enforcement of the inheritance tax.

We come now to what we consider the most weighty objection to the law and that is the legislative declaration that all gifts made within six years of death shall be construed to be made in contemplation of death, and as interpreted by this court in the Ebeling case meaning that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature. In the Ebeling case it was clearly pointed out that such was the legislative intent and we shall not extend this phase of the discussion. It is said by appellants and there is legal authority for the statement that no legislative fiat can substantially alter an existing fact. Hence, if a gift is not made in contemplation of death the legislature cannot make it one. As was said by the Appellate Court of New York, In re Barbour's Estate, 173 N. Y. 276, and affirmed by the Court of Appeals in 226 N. Y. 639, "the legislature cannot make that so which is not so." This is of course true in a literal sense. The legislature cannot change the essential [fol. 198] nature of an existing fact, but it can, on grounds of public policy, give a certain legal import to a fact, and for purposes of classification and for a practical administration of laws it may include in one class cases that fall without it considered individually, but usually falling within it collectively considered. Our reports show that after the enactment of the inheritance tax law many cases appeared in which elderly men of wealth for the purpose of evading the law made a more or less complete distribution of their property by way of gifts. The difficulty of proving that such gifts were made in contemplation of death coupled with the public necessity of not allowing large estates to escape the provisions of the law induced the legislature to make the classification it did. While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for, and especially where a practical and efficient administration of the law demands the classification.

It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin within six years of their death by far the larger proportion thereof have actually been made in contemplation of death. At any rate there is sufficient basis in fact for the truth of such statement to permit the legislature to act

upon it and make a classification accordingly. The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that if the gift is made within six years of the donor's death it shall for taxation pur- [fol. 199] poses be construed to fall within the class of gifts made in contemplation of death. The law is quite full of instances where, on grounds of public policy so as to effectively administer a law a certain definite and fixed legal import is given to facts, though the actual facts may be different. Thus dividends declared by a going corporation are conclusively declared to be made out of profits for income tax purposes though the actual facts may be quite the contrary. Van Dyke v. Milwaukee, 159 Wis. 460; State ex rel. Pfister v. Widule, 166 Wis. 48; Pfister Land Co. v. Milwaukee, 166 Wis. 223; State ex rel. Sallie F. Moon Co. v. Wis. Tax Comm. 166 Wis. 287. So insurance payable upon the death of a person shall be deemed a part of his estate for the purpose of the tax, though the deceased may not have paid a single premium upon the insurance. Upon the death of a joint tenant of property one half shall be deemed taxable to the estate though the interests may be different. Such provisions are made in order that the administration of tax laws may not be made too cumbersome, expensive and uncertain and to avoid escape from taxation. If A conveys his property to B to avoid his creditors, though upon the express promise that he will demand reconvey the statute steps in and says on grounds of public policy that the promise can not be enforced. The chapter on real property is full of instances where the legislature gives a conclusive construction to the title grant or relation of the parties when certain facts appear or certain language is used irrespective of what the particular parties meant.

Where the legislature acts in its own field in making classifications, or in construing the legal import of what constitutes a class, courts will not interfere unless it quite clearly appears that there is no just basis for the classification or for the legal import. In this case for [fol. 200] reasons already stated we think the class created by the legislature for taxation was a valid one, and that on grounds of public policy and in order to permit a practical and efficient administration of the inheritance tax laws it could import into the created class all gifts made within six years of the donor's death.

The Case of In re Barbour 173 N. Y. Supp. 276 among others is relied upon by appellants in support of the claim that the legislature did not intend and could not conclusively declare gifts made within six years to be made in contemplation of death. In the Barbour case the legislature declared that "every person shall be deemed to have died a resident and not a non-resident of the state of New York if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death." and the court held that such declaration created only a rebuttable presumption because the bill as first introduced read shall be deemed conclusively to have died a resident, and because to hold otherwise would result in double taxation for decedent was con-

fessedly a resident of New Jersey, and double taxation must rest upon clear intent. In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death, and no question of double taxation inheres. On the contrary it is a case of lawful taxation or of no taxation.

It is also urged quite strongly that there is no good reason why a gift made six years and one day before death should escape taxation and one made one day short of six years should be taxed. That is true. Neither is there a good reason why a person twenty one years of age should be allowed to vote while another one day short of [fol. 201] twenty one cannot vote. The sufficient legal answer is that where there is classification by division of time, by number or by weight there must be an arbitrary line drawn somewhere and if the line drawn by the legislature cannot be said to be clearly wrong it must stand.

We agree with the applicants that the classification made will not support a tax as one on gifts inter vivos only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts inter vivos should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered. We adhere to the ruling in the Ebeling case.

By the Court: Order affirmed.

[fol. 202] IN SUPREME COURT OF WISCONSIN

[Title omitted]

CLERK'S CERTIFICATE

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause, except such papers as are omitted pursuant to the praecipe of the parties filed herein.

That the original writ of error, the petition therefor, order allowing the same, the citation with its service endorsed thereon, the assignment of errors, praecipe of plaintiff in error and a copy of the bond, are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 14th day of July, A. D., 1924.

Arthur A. McLeod, Clerk of Supreme Court of Wisconsin.

(Seal of the Supreme Court of Wisconsin.)

[fol. 203] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT BY PLAINTIFFS IN ERROR OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed July 28, 1924

To the Clerk of the Supreme Court of the United States:

SIR: The points on which the plaintiffs in error intend to rely in said cause are the following:

1. That the Supreme Court of Wisconsin erred in affirming by its judgment the final order and judgment of the county court of Milwaukee County which adjudged that the gifts made by Ferdinand Schlesinger, deceased, to his wife and children within six years prior to his death, but which were not as a matter of fact made in [fol. 204] contemplation of his death were to be construed as having been made in contemplation of death and were subject to the taxes imposed upon transfers of property made in contemplation of death under the statutes of Wisconsin, and particularly of those portions of section 72.01 of said statutes which read as follows:

Section 72.01 A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed * * * to any person, association or corporation * * * in the following cases * * *

(3) When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section;

and in adjudging, contrary to the contention of these plaintiffs in error, that said provisions of the statutes, as applied to the gifts so made to the decedent's wife and children as aforesaid, but not made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are valid and not in conflict with or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly

that portion of Section (1) of said Amendment which reads as follows:

[fol 205] Nor shall any state deprive any person of life, liberty or property without due process of law;

and that portion of Section (1) of said Fourteenth Amendment which reads as follows:

Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws.

2. That said Supreme Court of Wisconsin erred in refusing to adjudge, as requested by said plaintiffs in error that the gifts which were made by the decedent to his wife and children within six years next prior to his death and which were not, as a matter of fact, made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, were not subject to the inheritance tax imposed by the said Statutes of Wisconsin; and that the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, which prescribe that such gifts shall be subject to the tax thereby imposed upon transfers made in contemplation of death and shall be construed to have been made in contemplation of death within the meaning of said section, although not in fact made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are invalid, unconstitutional and void, as being in conflict with and in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section (1) of said Amendment which reads as follows:

[fol 206] Nor shall any state deprive any person of life, liberty or property without due process of law;

and that portion of Section (1) of said Amendment which reads as follows:

Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws;

3. That the said judgment of the Supreme Court of Wisconsin, affirming the said judgment of the county court of Milwaukee County is repugnant to and in conflict with the provisions of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly those portions of Section (1) of said Amendment which read as follows:

Nor sall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The only portions of the record deemed necessary for the consideration of the foregoing points are the following:

Writ of error, pages 1-3.
Assignment of errors, pp. 10-15.
Citation, pp. 21-23.
Pleas Supreme Court of Wisconsin, p. 28.
Notice of appeal by executors from order of county court and assignment of errors upon said appeal, pp. 32-37.
[fol. 207] Notice of appeal by Mathilde Schlesinger and assignment of errors on said appeal, pp. 44-49.
(The notices of appeal and assignments of error by Armin A. Schlesinger, Henry J. Schlesinger and Gertrude MacLaren are in substantially the same form as the notice of appeal and assignment of errors by Mathilde Schlesinger and for that reason need not be printed.)
Petition of executors, pp. 101-107.
Order appointing special appraiser, pp. 108, 109.
Special appraiser's report, pp. 110-118.
Special appraiser's findings, pp. 118-122.
Special appraiser's appraisal, pp. 122-126.
Findings of County Court, pp. 127-133.
Supplemental petition by executors, pp. 134-136.
Stipulation of public administrator and inheritance tax counsel, pp. 137-139.
Final order determining inheritance tax, p. 140.
Certificate and return of county judge, pp. 141-144.
Stipulation as to bill of exceptions and record, pp. 145, 146.
Stipulation as to bill of exceptions, pp. 147, 148.
Bill of exceptions, pp. 149, 150.
Requested findings of fact, pp. 151-160.
Exceptions by executors, pp. 161-164.
Exceptions by Mathilde Schlesinger, pp. 165-169.
[fols. 208 & 209] (Exceptions by Armin A. Schlesinger, Henry J. Schlesinger and Gertrude MacLaren are in substantially the same form as those by Mathilde Schlesinger and for that reason need not be printed.)
Judge's certificate to bill of exceptions, pp. 185, 186.
Judge's supplemental return, pp. 187, 188.
Argument in Supreme Court of Wisconsin, p. 189.
Judgment of Supreme Court of Wisconsin, p. 190.
Opinion of Supreme Court of Wisconsin, pp. 191-201.
Certificate of Clerk of Supreme Court of Wisconsin, p. 202.
No other portions of the record except those indicated above are required to be printed.

Dated this 18th day of July, 1924.

Yours Respectfully, Charles F. Fawsett, Edward U. Smart, Charles E. Monroe, Counsel for the Plaintiffs in Error.

Service of a copy of the foregoing statement is hereby admitted this 19th day of July, 1924, and it is hereby stipulated and agreed that no other portions of the record than those above indicated by

counsel for the plaintiffs in error are necessary to the consideration of the points involved in this case and that no other than said portions of the record are necessary to be printed.

Herman L. Ekern, Attorney General; Franklin E. Bump, Assistant Attorney General, Counsel for the Defendants in Error.

[fol. 210] [File endorsement omitted.]

Endorsed on cover: File No. 30,521. Wisconsin Supreme Court. Term No. 556. Armin A. Schlesinger, Henry J. Schlesinger, and Myron T. MacLaren, executors, etc., et al., plaintiffs in error, vs. The State of Wisconsin and County of Milwaukee. Filed July 28, 1924. File No. 30,521.

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. [redacted]146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES F. FAWSETT,
Counsel for Plaintiffs in Error.

SUBJECT INDEX.

CASES AND AUTHORITIES.

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 556

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to review a judgment of the Supreme Court of the State of Wisconsin affirming a final order or judgment of the County Court of Milwaukee County imposing an inheritance tax on certain gifts made by the above named decedent several years prior to his death, which plaintiffs in error as the executors of his last will and testament were required to pay from his estate.

The statute under which the tax was imposed is claimed by plaintiffs in error to be in violation of the 14th Amendment of the Constitution of the United States upon the ground that it deprives them and the beneficiaries of the estate of the deceased, of their property without due process of law and denies to them the equal protection of the law.

STATEMENT OF THE CASE.

The statute in question is *Section 1 Chapter 44* of the Laws of Wisconsin enacted in the year 1903 and amended by *Chapter 643* of the Laws enacted in 1913. The section as it stood before the amendment of 1913, omitting parts not material, provided:

> "A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed . . . to any person . . . within the state in the following cases; (1) When the transfer is by will or by the intestate laws of this state, from any person dying possessed of the property while a resident of the state . . . . .
>
> (3) When the transfer is of property made by a resident . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

The amendment of 1913 added to subdivision (3) last above quoted, the following:

> *"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this Section."*

The above provisions at the time of the death of the decedent, January 3, 1921, were codified as part of *Chapter 64ff* Wisconsin Statutes 1919, followed by other provisions in the Chapter, fixing the rates and providing for the determination assessment and collection of the tax. They are now codified in *Chapter 72 Wisconsin Statutes*, 1925, in sections beginning with Section 72.01. The only one of such other provisions which needs to be here referred to, is that imposing liability for the tax, which provides:

> "All taxes imposed by this act shall be due and payable at the time of the transfer . . . . and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors and trustees of every state so transferred, shall be personally liable for such tax until its payment." *Sec. 1087-5 Wisconsin Statutes* 1919. *Sec. 72.05 Wisconsin Statutes* 1925.

The decedent died as above stated on the 3rd of January, 1921, a resident of the County of Milwaukee, State of Wisconsin, leaving an estate, including the gifts referred to, made to members of his family within six years prior to his death, in the total amount of $8,485,581.78. (Rec. 28) The gifts referred to aggregated $6,421,708.90. (Rec. 28)*

As the law has been construed by the Supreme Court of the State, all gifts made by a decedent in contemplation of death are regarded for the purposes of the determination assessment and collection of the tax thereon, as part of the estate of the decedent. (*Estate of Stephenson*, 171 Wis. 452, 456)

In the proceedings in the County Court of Milwaukee County for the determination of the tax, that being the court having jurisdiction in the premises, (*Estate of Shepard*, 184 Wis. 88; *Will of Porter*, 178 Wis. 556) the executors objected to the inclusion in the estate, of the gifts referred to, for the purposes of the tax, on the ground that they were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent, and that in so far as the statute required them to be construed as having been made in contemplation of death, it is in contravention of Section 1 of the 14th Amendment of the Constitution of the United States, in that it deprives the executors and the beneficiaries of the estate of their property without due process of law and denies to them the equal protection of the law.

The Court received the evidence offered upon the question of fact as to whether the gifts were made in contemplation of death, or to take effect in possession or enjoyment at or after the death of the donor, for the purposes of the constitutional question thus raised; and thereafter duly made findings of fact and conclusions of law, in which it was held that the gifts referred to were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent; but that the statute requiring them to be construed as having been made in contemplation of death because made within six years prior to the death of the donor, was constitutional and valid and that said gifts were subject to the tax under the terms of the statute. (Rec. 22-25)

From the final order or judgment of the County Court determining and imposing the amount of the tax in accordance with the terms of the statute on the gifts in question, the executors appealed to the Supreme Court of the state, (Rec. 4-7) wherein the objection to the validity of the statutes on the grounds stated above, were renewed. (Rec. 4-7)

*References to Record are to the Printed Transcript.

The judgment of the Supreme Court on the appeal, with one of the Justices dissenting, affirmed in all respects the judgment of the County Court, (Rec. 42) and this writ of error was duly allowed by the Court to review its judgment so rendered. (Rec. 1)

The opinion and decision of the state supreme court, will be found at pages 42 to 47 of the record.

As will be noted from the opinion, no exception was taken to the correctness of the finding of the county court that the gifts were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent, and the judgment of the appellate court was rendered on the basis that such finding was correct.

SUMMARY OF THE OPINION OF THE STATE SUPREME COURT.

The principal grounds upon which the decision of the court was based, may be summarized as follows:

1. The tax in question is not a property tax *but a tax upon the right to receive property from a decedent.* (Rec. 44; Italics ours)

2. The amendment to the statute does not create two classes of gifts, one of gifts in contemplation of death and another of gifts made within six years though not in contemplation of death. The legislative intent was to tax *only gifts made in contemplation of death. That is the only class created.* (Rec. 44, 45; Italics ours)

3. "The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death, bringing such gifts within the only class created, namely, gifts made in contemplation of death. Waiving the question of whether the legislature could bring gifts made within six years within the class, it is quite obvious that only one class is created and that a valid one, *for gifts made in contemplation of death stand upon a different basis than ordinary gifts made inter vivos.* It was the *former* the legislature sought to reach in order to insure a reasonably effective enforcement of the inheritance tax." (Rec. 45; Italics ours)

4. The legislative declaration in the statute that all gifts made within six years of death shall be construed to be made in contemplation of death means, "that *they shall conclusively be held to be gifts made in contemplation of death* and shall fall within the one taxable class of gifts created by the legislature." (Rec. 45; Italics ours)

5. "The legislature cannot change the essential nature of an existing fact, but it can, on grounds of public policy, give a certain legal import to a fact, and for purposes of classification and for a practical administration of laws it may include in one class cases that fall without it considered individually, but usually falling within it collectively considered." (Rec. 45)

6. "The *difficulty of proving that such gifts were made in contemplation of death* coupled with the public necessity of not allowing large estates to escape the provisions of the law induced the legislature" to adopt the amendment. (Rec. 45; Italics ours)

7. "While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for, and especially where a practical and efficient administration of the law demands the classification." (Rec. 45)

8. "It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin within six years of their death by far the greater proportion thereof have actually been made in contemplation of death. At any rate there is sufficient basis in fact for the truth of such statement to permit the legislature to act upon it and make a classification accordingly." (Rec. 45, 46)

9. "The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that if the gift is made within six years of the donor's death it shall for taxation purposes be construed to fall within the class of gifts made in contemplation of death." (Rec. 46)

10. "Where the legislature acts in its own field in making classifications or in construing the legal import of what constitutes a class, courts will not interfere unless it quite clearly appears that there is no just basis for the classification or for the legal import. In this case for reasons already stated we think the class created by the legislature for taxation was a valid one, and that on grounds of public policy and in order to permit a practical and efficient administration of the inheritance tax laws it could import into the created class all gifts made within six years of the donor's death." (Rec. 46)

11. *The legislative intent is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death.* (Rec. 47; Italics ours)

12. *The answer to the objection* that the law makes an invalid classification because it taxes gifts not made in contemplation of death if made within six years before the death of the donor, but does not tax similar gifts made at a longer period before the death of the donor is that "where there is classification by division of time, by number or by weight there must be an arbitrary line drawn somewhere and if the line drawn by the legislature cannot be said to be clearly wrong it must stand." (Rec. 17)

13. "We (the court) agree with the applicants that *the classification made will not support a tax as one on gifts inter vivos only. Under such taxation the classification is wholly arbitrary and void.* We perceive no more reason why such gifts inter vivos should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. *Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered.*" (Rec. 17; Italics ours)

SPECIFICATION OF ERROR RELIED UPON.

I.

The Supreme Court of Wisconsin erred in affirming by its judgment the final order and judgment of the County Court of Milwaukee County which adjudged that the gifts made by Ferdinand Schlesinger, deceased, to his wife and children within six years prior to his death, but which were not as a matter of fact made in contemplation of his death, were to be construed as having been made in contemplation of death and were subject to the taxes imposed upon transfers of property made in contemplation of death under the Statutes of Wisconsin, and particularly of those portions of Section 72.01 of said Statutes which read as follows:

> "Section 72.01. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed * * * to any person, association or corporation * * * in the following cases * * *
>
> (3) When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this State or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or

> after such death. Every transfer by deed, grant, bargain, sale or gift made within six years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, without an adequate valuable consideration, shall be construed to have been in contemplation of death within the meaning of this Section",

and in adjudging, contrary to the contention of these plaintiffs in error, that said provisions of the Statutes, as applied to the gifts so made to the decedent's wife and children as aforesaid, but not made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are valid and not in conflict with, or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly that portion of Section (1) of said Amendment which reads as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of Law;

or that portion of Section (1) of said Fourteenth Amendment which reads as follows:

> "Nor (shall any State) deny to any person within its jurisdiction the equal protection of the Laws."

II.

The Supreme Court of Wisconsin erred in refusing to adjudge, as requested by said plaintiffs in error, that the gifts which were made by the decedent to his wife and children within six years next, prior to his death and which were not, as matter of fact, made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, were not subject to the inheritance tax imposed by the said Statutes of Wisconsin; and that the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, which prescribe that such gifts shall be subject to the tax thereby imposed upon transfers made in contemplation of death and shall be construed to have been made in contemplation of death within the meaning of said Section, although not in fact made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are invalid, unconstitutional and void, as being in conflict with and in violation of Secton (1) of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section (1), of said Amendment which reads as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law;"

and that portion of Section (1), of said Amendment which reads as follows:

> "Nor (shall any State) deny to any person within its jurisdiction the equal protection of the Laws."

III.

The said judgment of the Supreme Court of Wisconsin, affirming the said judgment of the County Court of Milwaukee County is repugnant to and in conflict with the provisions of Section (1), of the Fourteenth Amendment to the Constitution of the United States, and particularly those portions of Section (1), of said Amendment which read as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

QUESTIONS RAISED.

The only provision of the statute to which exception is taken by plaintiffs in error is that part which was added by the amendment of 1913, reading as follows:

> "*Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this Section.*"

The contentions of plaintiffs in error with respect to this provision are:

1. That it deprives them of their property without due process of law, in that it arbitrarily and as the result of the conclusive presumption which it creates, places the gifts in this case, which were not in fact made in contemplation of death, in the class of gifts made in contemplation of death, and imposes upon them *as gifts made in contemplation of death*, contrary to the fact, the inheritance tax provided for in the statute which as held by the State Court, was intended to be imposed and can lawfully be imposed only on inheritances or transfers in the nature of inheritances.

2. The result of said provision is to make the classification of the statute for the purposes of the tax invalid, by arbitrarily importing into the class subject to the tax, transfers which are foreign to the basis of classification and not related thereto. Also, because it results in an unlawful discrimination by importing into the class subject to the tax, certain gifts inter vivos not made in contemplation of death, while excluding from the class on which the tax is imposed other gifts of the same character made under like circumstances and conditions as those which are made subject to the tax.

3. The right to make an ordinary gift of money or property which may be completed by manual delivery is a property right. Because the gifts in this case include property of that character, and the tax imposed is at a progressive rate, different from other property taxes, the statute denies to plaintiffs in error the equal protection of the law.

BRIEF OF ARGUMENT.

POINT I.

THE TAX IMPOSED BY THE STATUTE ON GIFTS INTER VIVOS IS AN INHERITANCE TAX, AND THE BASIS OF CLASSIFICATION OF SUCH GIFTS FOR THE PURPOSES OF THE TAX AND THE ONLY BASIS WHICH WOULD JUSTIFY SUCH A TAX, IS THAT THE GIFTS WERE MADE IN CONTEMPLATION OF DEATH. THE STATUTE AS CONSTRUED BY THE COURT, BRINGS THE GIFTS IN THIS CASE AND OTHERS OF LIKE CHARACTER, WITHIN THE BASIS OF THE CLASSIFICATION MADE BY THE STATUTE, BY A CONCLUSIVE PRESUMPTION WHICH DENIES TO PLAINTIFFS IN ERROR THE RIGHT TO PROVE THAT THE GIFTS IN THEIR CASE WERE NOT IN FACT MADE IN CONTEMPLATION OF DEATH, AND IMPOSES THE TAX UPON THEM AS GIFTS MADE IN CONTEMPLATION OF DEATH CONTRARY TO THE FACT, AND THEREBY DEPRIVES THE PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The construction placed upon the statute by the highest court of the state must be read into the statute as though explicitly a part thereof.

Fairfield v. County of Gallatin, 100 U. S. 47, 50.

As construed by the state court, the statute creates but one class of gifts *inter vivos* for the purposes of the tax, and that is, *gifts made in contemplation of death*.

Thus in the opinion it is said:

> "The second objection that the basis of classification is wrong because there are two classes, one of gifts made in contemplation of death and another of gifts made within six years though not in contemplation of death *misinterprets the legislative intent. Such intent was to tax only gifts made in contemplation of death. That is the only class created.* * * * Waiving the question of whether the legislature could bring gifts made within six years within the class it is quite obvious that only one class is created and that a valid one, *for gifts made in contemplation of death stand upon a different basis than ordinary gifts made inter vivos.*" (Rec. 44, 45; Italics ours)
>
> "* * * the tax in question is not a property tax but a tax upon the right to receive property from a decedent." (Rec. 44)

Nothing could be clearer than the construction placed by the court upon the statute, that the tax is an *inheritance tax;* that the basis of the classification of gifts *inter vivos* for the purposes of the tax is the fact of the gifts which are made subject to the tax having been made "in contemplation of death"; and that this basis of the classification *is essential to the validity of the tax*, because it is an inheritance tax imposed "*upon the right to receive property from a decedent*," and not a tax upon any ordinary transfer of property *inter vivos.*

It is obvious that the only possible justification there could be for imposing an inheritance tax on a gift *inter vivos* is that the gift was made in contemplation of death or was not intended to take effect in possession or enjoyment until at or after the death of the donor.

Without referring to authorities elsewhere as to the essential nature of the transfers which are *the basis of the classification*, we quote from the supreme court of Wisconsin construing the statute in question as follows:

> "The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests the purpose to tax all transfers which are accomplished by will, the intestate laws, *and those made prior to death which can be classed as similar in nature and effect because they accomplish a transfer of property under circumstances which impress upon it the characteristics of a devolution made at the time of the donor's death.*" (Italics ours)
>
> *State vs. Pabst*, 139 Wis. 561 at page 595.

As held by the court in the instant case, gifts made in contemplation of death, "*stand in a class by themselves* and as such they are made a part of the inheritance tax law". (Rec. 17)

Whether or not a gift was made in contemplation of death, as these words are used in the inheritance tax laws, is of course, a question of fact and *was established to be such* by the decisions of the supreme court of Wisconsin at the time the amendment to the statute of which we complain was adopted.

In *State vs. Pabst*, *supra*, 139 Wis. 561, decided at the January term of the Court in 1909, in defining the meaning of these words, the Court said:

> "The meaning of the words 'in contemplation of death,' as used in the Statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the Law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of *a testamentary disposition*. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty." (p. 589, 590).

In *State vs. Thompson*, 154 Wis. 320, 328, decided at the January term of the Court in 1913, the same year in which the Amendment to the Law here in question was passed and only a few months prior to its passage, the Court reaffirmed this definition in the following terms:

> "It was held in *State v. Pabst*, 139 Wis. 561, 121, N. W. 351, that the words 'in contemplation of death' as used in the Statute quoted were '*not used as referring to that expectation of death generally entertained by every person.*' Speaking affirmatively the opinion proceeds: 'The words are evidently intended to refer to an expectation of death *which arises from such a bodily or mental condition as prompts persons to dispose of their property* and bestow it on those whom they regard as entitled to their bounty.' In further explanation of the phrase it is said: 'A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking

forward to his death *as impending, and in view of that event,* is within the language of the Statute.'"

In the same case it is further said:

"The definition of the words 'in contemplation of death' given in the *Pabst* case does not differ from that announced by the New York Court in *Matter of Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390 (affirmed 178 N. Y. 575, 70 N. E. 1094) where it is said:

'This court has held that the words *in contemplation of death* do not refer to that general expectation which every mortal entertains, but rather to the apprehension which arises from some existing condition of body or some impending peril'.

Neither does it differ from the interpretation put upon the words by the Illinois Court in *People vs. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, where it held that contemplation of death *must be the impelling* motive for making the gift in order that it be subject to an inheritance tax.

It is only gifts made in contemplation of death that are taxable." (pp. 328, 329) (Italics ours)

Not only is the question of whether or not a gift was made in contemplation of death, a question of fact, but the tax imposed upon such gifts *as an inheritance tax* is a different kind of tax, having its origin in a different source as regards the taxing power of the state from other kinds of taxation.

Knowlton v. Moore, 178 U. S. 41; 56; 20 Supt. Ct. Rep. 747, 753 and cases cited in opinion.

As held by this court in that case, the taxing power in this class of taxation rests upon the foundation principle,

"that death is the generating source from which *the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately rested.*" (Italics ours)

Referring to numerous cases, federal and state, in which the constitutionality of such taxes has been upheld, the Court said:

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles. 1. An inheritance tax is

not one on property but one on the succession. . . . The right to take property by devise or descent is a creature *of the law* and not a natural right—a privilege—and therefore the authority which confers it may impose conditions *upon it*. From these principles it is deduced that the State may tax the privilege discriminate between the relations and between these and strangers, and grant exemptions; *and are not precluded from this power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation.*" (Italics ours)

Id. p. 55.

And again,

"Taxes of this general character are universally deemed to relate not to property or income but to the passage by will or by descent in cases of intestacy as distinguished from taxes imposed on property, real or personal as such because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passage of property *as the result of death* as distinct from a tax on property dissociated from its transmission or receipt by will or as the result of intestacy." (Italics ours)

Id. p. 52.

The power to impose such taxes is not limited by the usual constitutional restrictions in state constitutions which apply to other kinds of taxation. *Cooley Taxation* (4th Ed.) Sec. 1729.

The *basis of the classification* of gifts *inter vivos* for the purposes of the tax, as made by the statute and construed by the decision of the state court, is thus distinguished *in its essential nature* from any basis of classification upon which gifts *inter vivos* not made in contemplation of death could be taxed. It follows, therefore, that the legislature can no more bring a gift not made in contemplation of death and therefore *not of the essential character of the basis of the classification* made by the Statute, within the basis of classification by mere legislative declaration, than it can change the essential character of any other fact or transaction by legislative declaration.

The state court says:

"The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that if the gift is made

> within six years of the donor's death it shall for taxation purposes be construed to fall within the class of gifts made in contemplation of death." (Rec. 46)

That is to say from the fact that the gift is made within six years of the death of the donor, it is conclusively presumed to have been made in contemplation of death. There is no magic in the word "construed". It means the same in the connection in which it is used as the words "conclusively presumed." The statute makes the donees of the gifts as well as the administrators, executors or trustees of the estate of the donor liable for the tax and makes the tax a lien upon the property transferred until paid.

Statutes Sec. 72.05, ante p. 2.

Under the statute as construed by the court, some donees of property are permitted to prove that their gifts were not made in contemplation of death and thus avoid the tax, while others are not so permitted; but, are subjected to the payment of the tax as the result of the conclusive presumption made by the statute that their gifts were made in contemplation of death although the fact be otherwise. That the legislature has no power to enact such a conclusive presumption is established by the authorities, we believe, without exception.

> *Bailey vs. Alabama*, 219 U. S. 219; 31 Sup. Ct. Rep. 148;
>
> *Cockrill v. California*, 45 Sup. Ct. Rep. 190; (decided May 11, 1925);
>
> *Mobile J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 43;
>
> *Larson v. Dickey*, 39 Neb. 463; 58 N. W. 167;
>
> *Howard vs. Moot*, 64 N. Y. 268;
>
> *M. K. & T. Ry. Co. v. Simonson*, 64 Kans. 802; 68 Pac. 653;
>
> *Vega S. S. Co. v. Cons. El. Co.* 75 Minn. 309;
>
> *Cooley's Constitutional Limitations*, (7th Ed.) 526;
>
> *10 Ruling Case Law*, pp. 863, 866; 8 Cyc. 820;
>
> *In re Barbour's Estate*, 185 N. Y. App. Div. 445, affd. by the Court of Appeals, 226 N. Y. 639, without opinion.

In *Bailey vs. Alabama*, *supra*, the statute involved, as originally enacted provided that any person who with intent to injure or defraud his employer, entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause

and without refunding or paying for the property refused to perform the service, should be punished as if he had stolen it. The statute was subsequently amended so as to make the refusal or failure to perform the service or to refund the property or pay for the property without just cause *prima facie* evidence of the intent to injure or defraud.

This court held that the statute as so amended was unconstitutional. One of the grounds of the decision was that under circumstances stated in the opinion of the court, the presumption would become in effect conclusive upon a bare showing of the refusal or failure to perform the act or service without refunding the money or paying for the property received.

In connection with this ground of the decision, the court said:

> "This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Gong Yue Ting v. United States*, 149 U. S. 698, 749, 37 L. ed. 905, 925, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Mobile J. & K. C. R. Co. v Turnipseed*, decided by this court December 19, 1910 (219 U. S. 35, 55, L. ed. —, 31, Sup. Ct. Rep. 136).
>
> The latest expression upon this point is found in the case last cited, where the court by Mr. Justice Lurton, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact persumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.* If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not

shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'

"In this class of cases where the entire subject matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence *interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law.*" (Italics ours)

In *Larson vs. Dickey, supra*, with reference to the power of the legislature to enact conclusive presumptions, the court held, that while,

"the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or the manner of the exercise of the taxing power, *and which requirements it might, in the exercise of its discretion, dispense with entirely*, it has *no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation*" * * *. (p. 169) (Italics ours)

In support of the above proposition, the following cases were cited:

Bannon vs. Burnes, 39 Fed. 892;
Marx vs. Hanthorn, 30 Fed. 579;
Abbott vs. Lindenbower, 42 Mo. 162;
Wantlan vs. White, 19 Ind. 470;
White vs. Flynn, 23 Ind. 46;
McCready vs. Sexton, 29 Iowa, 356;
Allen vs. Armstrong, 16 Iowa, 508;
Grosbeck vs. Seeley, 13 Mich. 330;
In re Douglass, 11 La. Ann. 765, 6 South 675.

As shown above, the fact that a gift was made by death or in contemplation of death is

"*a jurisdictional fact, or fact vital to the exercise of the power*" of the legislature to *impose an inheritance tax* upon it.

As said by the New York Court of Appeals in *Howard vs. Moot, supra*,

"It may be conceded for all the purposes of this appeal that a law that should make evidence conclusive which

> was not so necessarily in and of itself and thus preclude the adverse party from showing the truth would be void as indirectly working a confiscation of property or a destruction of vested rights." (p. 268)

In *Barbour's Estate, supra*, the question involved was whether the transfer of the estate of a decedent was taxable under the provisions of the New York transfer act. The act contained a provision that,

> "For any and all purposes of this article and for the just imposition of the transfer tax, every person *shall be deemed* to have died a resident and not a non-resident of the state of New York if and when such person shall have dwelt or shall have lodged in this State during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death."

In the proceedings for the determination of the tax, it appeared that the decedent had lodged in the State of New York for the period required by the statute in the twenty-four months next preceding his death, notwithstanding which, it was established by the evidence that he was not in fact a resident of the State of New York. It was sought by the taxing authorities to give to the statute the force of a conclusive presumption. In holding that the law could not be so construed, the court said:

> "With reference to the power of the legislature to enact a statute of the force which the comptroller seeks to give to the amendment of 1916 to the transfer tax law, while it is not open to serious dispute that it has power to enact that one fact shall be evidence of another, it is a self-evident proposition that the legislature cannot make so that which is not so. When as here the statute says that under the circumstances named residence shall be deemed to exist and the fact is that it does not exist, the statute does not make the fact otherwise than it is. At most, it creates a presumption which may be overcome by evidence to the contrary."

Without attempting to review all of the cases cited, it will be found upon examination that they are all to the same effect upon this question.

It may be said that liability for taxes is ordinarily imposed by the legislature directly on persons and property. But in this case the liability is imposed only on transfers of a certain kind, and whether or not a transfer is of that kind is a question of fact. The legislature in creating the liability for the tax, has

seen fit to make it depend upon a question of fact which in essence is a judicial question, a question for the judiciary rather than for the legislative branch of the government. As we have seen, the power to impose the *kind of tax* which the statute imposes, can be invoked only from a certain state of facts, namely, where the transfer is made by death or in contemplation of death, or to take effect in possession or enjoyment at or after death. To repeat here the language of this court in *Knowlton vs. Moore, supra*,

> "Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being."

To justify such a tax, the necessary basis of fact must exist to invoke the taxing power to impose it. The legislature can make the law to apply to the facts. It cannot make the facts to which the laws is to apply.

In the opinion the state court says:

> "The legislature cannot change the essential nature of an existing fact, but it can, on grounds of public policy, give a certain legal import to a fact, and for purposes of classification and for a practical administration of laws it may include in one class cases that fall without it considered individually, but usually falling within it collectively considered." (Rec. 45)

> "Our reports show that after the enactment of the inheritance tax law many cases appeared in which elderly men of wealth for the purpose of evading the law made a more or less complete distribution of their property by way of gifts. The *difficulty of proving* that such gifts were made in contemplation of death coupled with the public necessity of not allowing large estates to escape the provisions of the law induce the legislature to make the classification it did. While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for, and especially where a practical and efficient administration of the law demands the classification." (Rec. 45)

> "It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin

> within six years of their death by far the larger proportion thereof have actually been made in contemplation of death. At any rate there is sufficient basis in fact for the truth of such statement to permit the legislature to act upon it and make a classification accordingly." (Rec. 45, 46)

Practically all of the arguments offered by the court in support of the statute are contained in the parts of the opinion above quoted, and I shall here undertake to answer, seriatim, the points advanced therein.

1. If the legislature can impose an inheritance tax on a simple gift made *inter vivos* with no thought or contemplation of death on the part of the donor at the time it is made, *on the ground that it was made in contemplation of death*, it does thereby in legal effect for the purpose of the tax, change the essential nature of the gift from one that was not made in contemplation of death to one that was so made. When we are considering the legal consequences which may be attached to a fact, the *legal import of the fact* is all that we are concerned with. It is the *legal import of the fact* that a gift was made in contemplation of death, which distinguishes it from all other gifts *inter vivos*, and gives to the legislature the right and power to impose an inheritance tax upon it. The legal import of such a transaction is of the same nature as the legal import of a transfer by death, and therefore the same kind of tax may be imposed upon it as on transfers by death.

When the legislature undertakes to give to a simple gift *inter vivos* the legal import of a gift made in contemplation of death, it is giving to it the legal import of a fact of an essentially different nature. If the legislature can do this in the case of such a simple fact as an ordinary gift *inter vivos*, there is no reason why it cannot do the same in the case of any fact and attach to it the legal consequences of a fact of an entirely different nature.

2. The court says that it may so metamorphose the fact "*for purposes of classification*" and for a "*practical administration of laws.*"

As applied to the facts of this case, the words, "*for purposes of classification*" mean simply for the purpose of imposing the tax on the gifts in question. And "*for a practical administration of laws*" means, as later explained by the court, for the purpose of dispensing with the necessity on the part of the state of proving the fact that the gift was made in contemplation of death, before imposing an inheritance tax upon it.

3. The terms, "*usually falling within it*" (the basis of classification) "*collectively considered*" as used by the court, are entirely without application to the facts of this case; because, it is impossible to say either as matter of law or as matter of fact that all gifts made within six years prior to the death of the donor *collectively considered are usually made in contemplation of death.*

The statute as it has been construed by the supreme court of the state applies to *every substantial* gift made by a resident of the state.

Estate of Stephenson, 171 Wis. 452, 459.

In that case it was held that a gift of $23,000 out of an estate aggregating nearly seven millions of dollars, less than one-half of one percent of the estate, was a material part of the estate within the meaning of the statute, and the terms "material part of the estate" as used in the statute were practically held to mean *any gift substantial in amount.*

If gifts may be made at all without being made in contemplation of death, it is self evident that they may be made within six years before the death of the donor as well as at any other period of his life. A gift may be made in contemplation of death at any time during life, and it is equally true that one may be made without any thought of death at any time during life if gifts *causa mortis* are excepted.

In *State vs. Thompson*, 154 Wis. 320, before cited, at pages 329, 330, 331, the court said:

> "It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impels the making of the donation." * * *
>
> *Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own death.* * * * *. * * * *
>
> Age in itself is not a very important factor in determining the capacity of persons to deal with their property, or in ascertaining the motives which actuated them in disposing of it. The deceased in this case might have made the gifts which he did because he expected to die at any time. *But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death* and because he wanted his daughter and her family to enjoy the benefits

> of a part of his accumulations and to see her and them use what was given while he was still alive so that he could observe the uses to which it was put. It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face." (Italics ours)

It is also common knowledge and experience that six years is ample time within which a person may contract even a chronic disease and die of it. If it is permissible to enter the field of speculation, we think it may safely be said, that the great majority of people who die were not contemplating or thinking particularly about death as long as six years before the event occurred.

It therefore seems entirely obvious that it cannot be said with any showing of reason, that all gifts substantial in amount, made within six years before the death of the donor, collectively considered, are usually made in contemplation of death. What the court meant by the language last referred to was probably more clearly defined in the statement which followed in which it is said:

> "It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin within six years of their death by far the larger proportion thereof have actually been made in contemplation of death."

This also, for the reasons above indicated, would seem to be a purely gratuitous statement. At least, there was no evidence before the court to support it. But if we assume it to be correct, is it not entirely immaterial? The statute properly covers all gifts made in contemplation of death. The objection made to its validity is that it also covers a great many including those in this case, which were not made in contemplation of death. Is it important, whether of all the gifts covered by the terms of the statute, *a majority* or only a *minority* may prove to be in fact made in contemplation of death? The fact that those not made in contemplation of death, which are nevertheless taxed by the statute *as gifts made in contemplation of death*, may be a minority rather than a majority of all the gifts covered by the statute, cannot affect the constitutional objection. The rights of the minority under the constitution are entitled to protection as well as those of the majority.

4. The court says: "*The difficulty of proving that such gifts were made in contemplation of death* coupled with the public necessity of not allowing large estates to escape the provisions of the law induced the legislature to make the classification it did."

This ground offered by the court in support of the statute is the same as that which was offered by the supreme court of Alabama in support of the statute held invalid by this court in *Bailey vs. Alabama, supra.* Under the Alabama statute as originally enacted, it was necessary to prove the fraudulent intent, and the difficulty of making proof of such intent was referred to in *ex Parte Reilly*, 94 Ala. 82. In *Bailey v. State*, 158 Ala. 25, which thereafter arose, the state court in upholding the amendment to the statute which was the subject of attack, stated that "*it was the difficulty in proving the intent made patent by that decision*" (The Reilly case) "*which suggested the amendment of* 1903." (See 219 U. S. at page 233.)

But when the question came before this court, it was not considered that this explanation of the amendment was sufficient to answer the constitutional objection.

The presumption in this case goes farther than the presumption in the case of the Alabama statute, as here it is expressly made conclusive. As said by the state court:

> "In our case the legislative intent we think is clear that the specified gifts were to be *conclusively construed* to be gifts in contemplation of death, * *". (Rec. 47)

If the *fact* that gifts were made in contemplation of death is *important* in determining the classification for the purpose of imposing an inheritance tax on such gifts, the question of whether the fact is difficult or easy to prove would not seem to be material.

5. As to the "*public necessity of not allowing large estates to escape the provisions of the law*", this necessity should not be allowed to supersede the right of the individual taxpayer to have the question of his liability to the tax fairly determined.

The statute does not purport to impose the tax on any gifts *inter vivos* except those made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the donor. It is not a general tax, but a special tax which purports to be imposed only on transactions of a certain kind and on the parties to those transactions. In any case to which it is claimed the statute applies, the question cannot be avoided whether the transaction was the *kind of transaction* which was intended to be taxed or upon which the legislature had the right to impose the kind of tax the statute imposes. In the determination of this question, the only reason that can be offered for any presumption, one way or the other, is that ordinarily the parties to the transaction are perhaps in better position to know the facts than the state. This might possibly justi-

fy a rebuttable presumption, *but wherein was the necessity for a conclusive presumption?* The definition of the courts as to the meaning of the words, "in contemplation of death" makes the fact susceptible of proof by inference from the physical condition of the donor and the facts and circumstances surrounding the transaction. The facts from which the proper inference should be drawn are not necessarily inaccessible to the state. If it can be said that they are more accessible to the parties to the transaction, it still cannot be assumed that they will not tell the truth about them. The possibility that in some cases they may not do so, is hardly a sufficient reason for foreclosing all inquiry and making the presumption conclusive. In law, facts which may be the subject of controversy *are facts*, when judicially ascertained upon a fair hearing of the question, even though the judicial determination may not in all cases be correct. If the fact that a gift was made in contemplation of death furnishes the only proper basis for imposing an inheritance tax upon it at all as appears to be conceded in the opinion of the state court, it would seem that the tax should not be imposed in a case where the fact that the gift was made in contemplation of death is denied, until it is judicially determined that such was the fact.

The fact that the tax may be avoided in some cases in which it should be imposed because of the impossibility of ascertaining the exact truth, is no reason for imposing the tax in the cases covered by the amendment *without any regard whatever for the truth.*

It is probably correct to say that there is no department of the administration of the laws in which justice may not sometimes miscarry.

6. The court further says: "While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for * * *".

What difference is there in effect, between declaring a gift not made in contemplation of death *to be one so made* and taxing it as such, and drawing it into the *class* of gifts made in contemplation of death and taxing it as a member of the class?

As to the implications involved in the proviso "*provided that gifts of that class are usually and ordinarily of the kind which the class calls for*", we have endeavored to show that there cannot in the nature of things, be any warrant for the assumption

that all gifts that happen to be made within six years before the death of the donor "*are usually and ordinarily made in contemplation of death*," and shall not repeat the argument on that point.

The court concedes that,

> "as to a particular gift not made in contemplation of death the legislature could not declare it to be made in contemplation of death * * *."

Does not the statute in this case *declare* as to each particular gift made within six years prior to the death of the donor as the fact is ascertained by the death of the donor, that it was made in contemplation of death regardless of whether it was or not?

Tax laws operate specifically and impose the tax upon the particular persons or subjects of taxation which come within their terms. The state court expressly holds that the statute does not make a separate class of all gifts made within six years before the death of the donor. But on the contrary holds that it creates only one class, namely gifts made in contemplation of death. Furthermore, that gifts made within six years prior to the death of the donor *could not be* lawfully classified or made a separate class, for the purposes of the tax. (Rec. 47) The statute must therefore apply to each particular gift which comes within its terms, rather than to gifts covered by it as a class. Every gift depends upon the particular facts or circumstances under which it was made as to whether or not it was made in contemplation of death. Obviously, therefore, gifts made within *any period* before the death of the donor cannot be considered as a class, either as having been made in contemplation of death or otherwise; for each of such gifts necessarily depends in that respect on its own particular facts and circumstances.

The court says:

> "It is also urged quite strongly that there is no good reason why a gift made six years and one day before death should escape taxation and one made one day short of six years should be taxed. That is true. Neither is there a good reason why a person twenty-one years of age should be allowed to vote while another one day short of twenty-one cannot vote. The sufficient legal answer is that where there is classification by division of time, by number or by weight there must be an arbitrary line drawn somewhere and if the line drawn by the legislature cannot be said to be clearly wrong it must stand." (Rec. 47)

While all that is said here may be true as abstract propositions, it obviously has no application to the facts of this case. We are not dealing with a case where it is difficult to draw the line between what the legislature intended to tax and what it did not intend to tax. The state court expressly holds that it intended to tax only gifts made in contemplation of death. Therefore, *it could not have intended to tax any gifts not made in contemplation of death.* There was no difficulty presented in drawing a correct line, but the statute draws a line *which is clearly incorrect*, because it results in subjecting to the tax gifts which the court says *the legislature did not intend to tax*, namely, gifts that were not made in contemplation of death. For the purposes of a classification of transfers of property, based on the fact that they were made in contemplation of death, transfers *which were not so made*, are, regardless of *when they were made*, obviously in *direct antithesis* to the basal fact of the classification.

If we may accept the definite construction placed by the state court upon the statute to the effect that only one class of gifts *inter vivos* is created for the purposes of the tax, namely, gifts made in contemplation of death, and that these are the only gifts intended to be taxed, it follows that the amendment to the statute was not intended to extend the classification to include gifts not made in contemplation of death, but was merely intended to avoid proof of the fact that any of the gifts covered by the amendment were made in contemplation of death. In other words, to make it consistent with the court's decision, *it must be in the nature of a rule of evidence; a presumption, which instead of being made rebuttable, giving the parties affected an opportunity to be heard, is made conclusive in the cases which it covers.*

In its opinion the state court seems to agree that the tax could not be imposed on the gifts in this case in their true character as simple gifts *inter vivos*, or on any such gifts *as such*, but holds that the tax may be imposed upon them by drawing them into the class of gifts made in contemplation of death and imposing the tax upon them as gifts of that character. But the effect is precisely the same. The legislature can not do by indirection that which, admittedly, it has no power to do directly.

In *Choctaw O. & G. R. Co. v. Harrison*, 235 U. S. 292, 298; 35 S. C. R. 27, 29, this court said:

> "Neither state courts nor legislatures by giving a tax a particular name or by the use of some form of words can take away our duty to consider its real nature and effect."

In *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. R. 99 (102), the court said:

> "Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

The effect of the amendment to the statute is to impose the tax on a certain class of gifts *inter vivos* not made in contemplation of death which the state court expressly holds was intended to be imposed and could lawfully be imposed only on such gifts *inter vivos as were made in contemplation of death.*

All the considerations suggested by the state court in support of the statute will be readily recognized as mere considerations of expediency. None of them meets the specific constitutional objections here urged. The consideration that the amendment to the statute makes for a more practical and efficient administration of the law, as explained in the opinion means nothing more than that the state is thereby relieved of the necessity of making proof of the facts in the cases covered by the amendment. This is accomplished at the expense of denying the taxpayer the right to be heard on the question of fact upon which his liability to the tax admittedly depends. If considerations of mere expediency can suspend the operation of constitutional limitations, such limitations amount to nothing.

There is no question of public policy or of state policy involved. It is, of course, the policy of all the states to enforce their laws and avoid evasions as far as possible. There is no rule of public policy in the state of Wisconsin against the making of gifts, generally speaking. Such a policy would be to discourage charity and benevolence, which no state would admit that it stands for.

As said by the court in *State vs. Thompson*, *supra*, already quoted,

> "It is only gifts made in contemplation of death that are taxable."

The same state policy is affirmed in the opinion of the court in this case. The question of whether a gift is made in contemplation of death or not, is purely a question of fact and there can be

no rule of public policy in a state whose policy is not to tax gifts not made in contemplation of death, which would prevent inquiry into the fact whether a gift in a particular case was so made or not. Whatever inherent difficulty there may be in the practical administration of the law is obviously no ground for disregarding the express limitations of the federal constitution *on the powers of the state*.

POINT II.

THE CLASSIFICATION MADE BY THE STATUTE AS AMENDED, IS INVALID BECAUSE IT INCLUDES GIFTS NOT MADE IN CONTEMPLATION OF DEATH IF MADE WITHIN SIX YEARS PRIOR TO THE DEATH OF THE DONOR, BUT DOES NOT INCLUDE OTHER GIFTS OF LIKE CHARACTER MADE UNDER LIKE CIRCUMSTANCES AND CONDITIONS.

The only answer made in the opinion of the state court to the objection that the classification is invalid because it includes some gifts not made in contemplation of death without including others made under the same circumstances and conditions, is that only one class of gifts is created, and that, gifts made in contemplation of death. This ignores the fact that the statute covers gifts not in fact made in contemplation of death as well as those which were. It is difficult to see how this fact can be ignored when the constitutional objection is raised that this very fact results in an unlawful discrimination. The court holds that the gifts covered by the statute which were not in fact made in contemplation of death, are taxed by the statute, *not in their true character as gifts not made in contemplation of death*, but as members of a class which was *made in contemplation of death*. For the purpose of testing the validity of the classification, *are we not entitled to consider the cases which it covers, in their true character and in accordance with the facts?*

The court says that only one class is created, and that the intent of the legislature was to tax only gifts made in contemplation of death, but that gifts not made in contemplation of death are *drawn by the statute into the class*. Whether the statute taxes the gifts *inter vivos* not made in contemplation of death, as *a class*, or draws them into the class of gifts made in contemplation of death which is taxed, would seem to be a distinction without any real difference, in so far as the right of plaintiffs in error to object to the classification is concerned. The court says:

> "We agree with the applicants that the classification will not support a tax as one on gifts *inter vivos* only,

> Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event." (Rec. 47)

It would seem to follow from this that if the statute had said that all gifts made in contemplation of death are subject to the tax, and also all gifts not made in contemplation of death *provided they are made within six years prior to the death of the donor*, it would be invalid under this ruling of the court. Yet the statute in the form of words in which it was enacted *is precisely the same in effect as though it had been enacted in the form above stated.* Will it be claimed that the validity of the statute depends on the mere difference in the form of words, where there is no difference in meaning and effect between the two forms?

The effect of the statute as construed by the court, is to place all gifts made within six years before the death of the donor even though not made in contemplation of death, in the class for the purposes of the tax with gifts made in contemplation of death, leaving out of the class all other gifts not made in contemplation of death. To justify this discrimination, it is necessary under the well established rules of classification, that there be some substantial distinction between gifts made within six years prior to the death of the donor but not made in contemplation of death, and similar gifts made under precisely the same circumstances and conditions except at different dates with reference to the death of the donor.

The classification must also stand the test of the well established rule, that to be valid it must be rational and the cases included in it must be germane to the basis of the classification.

The authorities by which these rules are established are doubtless familiar to this court, and we shall cite only a few of the many cases that might be referred to.

In *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 415; 40 Sup. Ct. Rep. 560, the court says:

> "It is unnecessary to say that the equal protection of the laws required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation *so that all persons similarly circumstanced shall be treated alike.*" (Italics ours)

In *Southern R. Co. vs. Greene*, 216 U. S. 400, 412, 417; 30 Sup. Ct. Rep. 289 at page 291, it is said:

> "The equal protection of the laws means subjection to equal laws, *applying alike to all in the same situation.* * * *
>
> While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based *upon some real and substantial* distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified *by calling it classification.*" (Italics ours)

These rules and principles of classification have been so frequently declared by this and other courts in substantially the same terms, that they have become stereotyped in the law. To refer to a few of the cases in the Wisconsin Court,

Black vs. State, 113 Wis. 205, 221:

> "It is a trite expression that classification in order to be legal must be rational; it must be founded upon real differences of situation or condition which bear a just and proper relation to the attempted classification and reasonably justify a difference of rule."

Borgniss vs. Falk, 147 Wis. 327, 353:

> "The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class."

Nunnemacher vs. State, 129 Wis. 190, 221:

> In order to justify classification there must, of course, be substantial and real differences of situation calling for or reasonably suggesting the necessity for different treatment."

Johnson vs. City of Milwaukee, 88 Wis. 383, 390:

> "Certain rules by which the propriety of the classification may be tested have been stated by courts and have become well established."

* * * *

> "One rule is: all classification must be based upon substantial distinctions which make one class *really different from another.*" (Italics ours)

The transaction which is taxed is the gift *and the liability for the tax is imposed upon the donee and the property received as well as upon the legal representatives of the donor.*

> Statutes, Sec. 72.05, ante p. 2.

To show as graphically as possible, that the mere fact that one gift is made within the period of the statute and another not, does not afford any basis of distinction to justify discrimination, we will take the following illustration:

A has $200,000 which on the first of January, 1918 he desires to divide between his two sons. He is in the prime of life and is not contemplating death. On that day he gives to one, $100,000 and on the next day, the 2nd of January, to the other the same amount in the same kind of property. He dies on the second of January, 1924. Under the amendment, the one who receives the second $100,000 will be subject to the tax, while the other would not. They were related to the donor in precisely the same way. They received the same amount of the same kind of property and the gifts were actuated by precisely the same motives and were made under the same conditions, the only difference being that they were made one day apart because, we will assume, it took two days for the donor to make the division.

For comparison, we refer to a case in the state supreme court, *Black vs. State, supra*, where the court based its decision holding the law in that case invalid on a somewhat similar illustration. The law involved was an inheritance tax law which exempted all estates under $10,000 from taxation. In the opinion, holding the law invalid, the court said:

> "Thus it results that one collateral relative receiving a legacy of $2,000, from one testator, whose estate amounts to but $9,500, pays no tax, while another collateral relative in the same degree, receiving a legacy of $2,000 from another testator, whose estate amounts to $10,500, is obligated to pay a tax. Here is unlawful discrimination, pure and simple. *No rational distinction or difference can be drawn between the two legatees simply because the estates from which their legacies come are of slightly different size. They are both within the same class, surrounded by the same conditions, and receiving the same benefits. One pays a tax, and the other does not. This is not the equal protection of the laws.*" (Italics ours) (p. 222).

Paraphrasing the language of the court in that case and applying it to the two donees in the illustration given above in this case, "no rational distinction or difference can be drawn between the two sons simply because they received their gifts on slightly different dates. They are both within the same class, surrounded by the some conditions and receiving the same benefits. One pays a tax and the other does not. This is not the equal protection of the laws."

In the case of any two gifts made by different individuals at the same time, neither of which is in fact made in contemplation of death, *each is subject to the same contingency as to whether the donor will or will not live longer than six years.* There is therefore no distinction whatever between them in this respect *at the time they were made.*

The character of the transaction is fixed by the motive which actuated it and by the circumstances and conditions under which the gift was made and cannot, of course, be affected by the circumstance whether the donor may happen to live one year or six years, *after it was completed.* Yet in the case of a gift where the donor dies within six years after it was made, the donee and the property in his hands are subject to the tax, while in the case of a gift made under precisely the same circumstances and conditions, if the donor lives more than six years, the gift is not subject to the tax and the donee is not required to pay it.

In *State ex rel Milw. Sales & Investment Co. vs. Railroad Commission*, 171 Wis. 458, the court said:

> "The provisions of both the federal and state constitutions guaranteeing equal protection of the laws were intended to safeguard the fundamental right of equality before the law and to prevent the enactment of a law which makes unjust discrimination *by depriving one person of a right in dealing with his property which it grants another of the same class under like circumstances.*" (Italics ours; syllabus).

And this court in *Southern R. Co. vs. Greene, supra*, declared:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

We understand the state court to concede that the mere fact that gifts were made within a given time before the death of the donor does not in itself afford a legal basis for classifying such gifts for purposes of taxation. The court expressly holds, that ordinary gifts *inter vivos* made within six years before the death of the donor could not be taxed as a separate class; and that to so classify them without including all other ordinary gifts made *inter vivos* in the class, would be to make a wholly arbitrary and void classification. (Rec. 47) This is obviously so, for there can be nothing in the mere circumstance that the donor in one case lives five years after making the gift and in another seven years, to make one of the transactions really different in kind, quality or character from the other.

THE CLASSIFICATION IN SO FAR AS IT INCLUDES GIFTS NOT MADE IN CONTEMPLATION OF DEATH MERELY BECAUSE THEY WERE MADE WITHIN SIX YEARS PRIOR TO THE DEATH OF THE DONOR, IS ARBITRARY, IRRATIONAL AND UNREASONABLE.

In *Gulf C. & S. F. Ry. Co. vs. Ellis*, 165 U. S. 150, 159, this court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

And in *Southern R. Co. vs. Greene*, *supra*, at page 417:

> "The classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

In *Black vs. State*, *Supra*, at page 221, the Wisconsin court said:

> "It is a trite expression that classification in order to be legal must be rational."

As held by the state court in this case, *the basis of the classification* is the fact that the gifts were made in contemplation of death. The mere fact that the donor may happen to die wtihin six years after making a gift, in itself, without regard to any of the facts and circumstances which attended the making of the gift is obviously an independent fact not necessarily connected with or in any way related to the motives or considerations which led to the making of the gift. Death must follow

a gift made *inter vivos* at some time, and whenever it occurs the inquiry is naturally suggested under the statute, whether the gift was made in contemplation of death. *The time or date of the death* of the donor following the gift, is obviously *in itself*, irrelevant upon the question of the motive which actuated the gift. Whether it is relevant or not *depends upon the facts and circumstances to be considered in connection with it.* If it be shown that the donor was suffering from a fatal disease at the time of making the gift and died within a short time thereafter, the time of death would be a significant and important circumstance; but if the donor were killed shortly after making the gift in a railroad wreck, the time between the making of the gift and his death would be obviously irrelevant.

It is a matter of common knowledge that the motives or considerations by which people are induced to make gifts are as various as their different interests, individualities and relationships. As recognized by the supreme court of Wisconsin, in one of the cases cited, the mere fact that one may make a gift of a large part of his estate even in his old age, to a child, is not in itself sufficient to warrant the inference that the gift was made in contemplation of death because these facts standing alone are equally consistent with other motives which might have actuated the gift.

As one may make a gift *at any time during his life* as the result of any one or more, of a number of motives or considerations, it seems entirely obvious that in singling out gifts made within six years prior to the death of the donor to be included in the classification of gifts made in contemplation of death, *the statute makes a purely arbitrary selection.* The fact upon which the selection is based has no necessary relationship whatever to the *basis of the classification.* The mere fact that one may die within six years after making a gift can not *in itself*, afford any basis for inference that the gift was made in contemplation of death. As there is no reasonable basis for the conclusive presumption which the statute creates, it must be arbitrary.

The basis of selection as applied to the gifts covered by the amendment is not only arbitrary, but is speculative and highly capricious, and anything but reasonable or rational.

After the gift has been made and the transaction closed, the donor no longer has any connection with the property except that his legal representatives may be called on to pay the tax on it if he die within six years. Whether or not it will become subject to the tax in the hands of the donee is made by the statute a pure lottery depending upon the chances of life and death of

the donor during a period of six years after he has parted with his title. One in the prime of life and the best of health may make a gift in the morning and be killed by a stroke of lightning in the afternoon. The donee finds that he and the gift he received in the morning have become liable to the tax during the day, through no act of his but by a pure accident entirely disconnected with the property or the transaction through which it was received.

Under the decisions of the Supreme Court of the State, the tax is imposed according to the value of the property and at the rates in force, *at the time of the death of the donor.*

Estate of Stephenson, 171 Wis. 452, 457.

Until the death of the donor or the expiration of six years, no one can tell what the amount of the tax will be, or whether there will be a tax at all. The tax is upon the *transfer* made by the gift, but it is not determined, either as to amount or whether or not there will be a tax, by *the fact of the transfer* or by any circumstances or conditions existing at the time; but by a contingency in the future entirely disconnected with the transfer, in no way related to it and entirely beyond human control as to whether it happens or not. One offered a gift might not wish to accept it, if he knew or thought he would have to pay a tax, the amount of which could not then be computed. But there is no way of telling, however hale and hearty the donor may be, or whatever the motive of the gift.

Can such a basis of selection of gifts *inter vivos* for purposes of the tax, be supported as reasonable or rational? Is it not purely arbitrary, unreasonable and irrational, not to say freakish?

NONE OF THE CONSIDERATIONS OFFERED BY THE STATE COURT IN SUPPORT OF THE STATUTE, AFFORDS ANY ANSWER TO THE OBJECTION THAT THE CLASSIFICATION IS INVALID BECAUSE OF THE UNWARRANTED DISCRIMINATION IT MAKES BETWEEN GIFTS INTER VIVOS NOT MADE IN CONTEMPLATION OF DEATH.

The difficulty of proof referred to in the opinion is certainly no answer to this objection. It can be no more difficult to prove the fact in the case of a gift made in contemplation of death within six years prior to the death of a donor than in the case of one made a longer time before his death. It is no answer to this objection to say that the amendment makes for a more practical and efficient administration of the law. The law would be even easier to administer, evasion of it would be made even more difficult, and it would yield better results to the state if it were

made to apply to all gifts whenever made, regardless of whether made in contemplation of death or not. If it can be made to apply to all gifts within six years prior to the death of the donor, there is no reason why it could not be made to apply to all gifts whatsoever and it should so apply, to avoid unconstitutional discrimination.

POINT III.

THE RIGHT TO MAKE AN ORDINARY GIFT OF MONEY OR PROPERTY WHICH MAY BE COMPLETED BY MANUAL DELIVERY IS A PROPERTY RIGHT. BECAUSE THE GIFTS IN THIS CASE INCLUDE PROPERTY OF THAT CHARACTER, AND THE TAX IMPOSED IS AT A PROGRESSIVE RATE, DIFFERENT FROM OTHER PROPERTY TAXES, THE STATUTE DENIES TO PLAINTIFFS IN ERROR THE EQUAL PROTECTIN OF THE LAW.

Keeney vs. New York, 222 U. S. 525, involved gifts *inter vivos* of future interests in real estate, and limitations over of a more or less artificial character. The question raised was whether the New York transfer tax as applied to such gifts was a property tax. In holding that it was not, the court said:

> "So much of the New York statute as imposes an inheritance tax was sustained in *Plummer v. Color*, 178, U. S. 115, 44, L. ed. 998, 20 Sup. Ct. Rep. 829, and in several decisions of the court of appeals of that state. But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers *inter vivos*. The first, they say, is an excise imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. They argue that inheritance taxes have been sustained on the ground (*United States vs. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073) that no one has the natural right to acquire property by will or descent, and if the state permits such acquisition, it may require the payment of a tax as a condition precedent to the right of using that privilege. On the other hand, they contend that the right to convey or come into possession does not depend upon a statutory or taxable privilege, but is a right incident to the ownership of property, and that the tax imposed by this statute on that right is in effect a tax on the property itself, and void because lacking in the elements of uniformity and equality required in the assessment of property taxes.
>
> But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail

> plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainder-man any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes . . .

The statute here in question makes no distinction between property, the title to which may be transferred by mere delivery accompanied by the intent to make a gift, and artificial interests in real estate such as was involved in the case above cited, or stock in corporations which in order to complete the transfer must be transferred on the books of the corporation.

The gifts in this case included gifts of cash amounting to $178,142.64 as well as stocks in corporations. (Rec. 15)

In *Thomas vs. U. S.* 192 U. S. 363, the question raised was the validity of a stamp tax on the transfer of certificates of stock. It was claimed that the tax was in reality a tax on the stock and therefore a property tax. The court held otherwise on the ground that:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale and the element of absolute and unavoidable demand is lacking." (p. 371)

The court in its opinion likened the tax to taxes on sales at exchanges or boards of trade and on the transmission of property from the dead to the living.

As the gifts in this case include gifts of money, the question here presented is whether the right to make such a gift which may be consummated by manual delivery without the aid of the legislature, or of any of the machinery of government, is not a property right inherent in the ownership of the property.

It is true the state court in this case holds that the tax in question is not a property tax, but for the purposes of the constitutional questions involved, this court is not bound by this interpretation of the statute by the state court.

> *St. L. & S. W. Ry. Co. vs. Arkansas, Supra*, 235 U. S. 350.

Furthermore, the grounds upon which the ruling of the state court was made, were obviously contrary to the facts. The ruling of the court was,

> "* * the tax in question is not a property tax, *but a tax upon the right to receive property from a decedent.*" (Rec. 44)

The gifts in this case as we have seen were not received from a decedent. On the contrary, about half of them were made more than four years before the death of the decedent, and it is judicially established that none of them was made in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent.

The state constitution, *Section 1 of Article 8* explicitly prescribes the subject matter upon which taxes may be imposed in the state of Wisconsin in the following terms:

> "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall direct. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

Under these express provisions of the state constitution, to impose a tax on gifts *inter vivos*, it must be imposed either as a tax on property, or as a tax on a *privilege*. It is not a tax on income or occupation.

As applied to gifts made in contemplation of death which are universally regarded by the courts as testamentary in character and in the nature of inheritances, it has generally been held that such taxes are taxes on a privilege. As stated in *Ruling Case Law*, summarizing the leading cases on the subject:

> "An inheritance tax in any of its customary forms is not a tax on the property of the decedent with respect to which it is levied, but is an excise imposed on the privilege of transmitting or receiving property upon the death of the owner, and consequently is not subject to any of the constitutional limitations upon taxes on property found in the state constitutions."
>
> Vol. 26, Sec. 167, p. 196.

Can it be successfully claimed that the right to make an ordinary gift of personal property which the owner may make by simply delivering the property to another with the intent that it shall belong to such other, a mere privilege in the sense that it is the creature of artificial law?

The right to make such a gift antedates, of course, the adoption of any of our constitutions. It is not a creature of the law, but a natural right. Governments do not create such rights but are organized, under our system at least, to protect them. The right to make gifts is as old as the right of private ownership of property and is implied by such ownership. To dispose of property in this way is to exercise an ordinary right of ownership. If an inherent right of ownership cannot be exercised without the payment of a tax, is not the tax, a tax on the right of ownership? A tax on a right of ownership of a thing, is in law a tax on the thing owned.

Dawson vs. Kentucky Distilleries & Warehouse Co., 255 U. S. 288.

In that case a tax was imposed by the state of Kentucky upon the business of removal by the owner of whisky from a public warehouse. It was camouflaged as a tax on the *business* of owning and storing whisky in bonded warehouses. The court held that the tax was not in reality on the *business* of owning and storing whisky in bond or upon the *business* of removing the liquor owned, but was in reality a tax on the *right* of removing the liquor from the warehouse. As to the nature of the tax, the court said:

> "But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable: i. e., consumption, sale or keeping for future consumption or sale . . . The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. (Citing cases.) It cannot be made an occupation or license tax by calling it so. (Citing cases.) The language of the emergency clause in the act discloses that the legislature considered that it was, in fact, taxing the whisky.
>
> As we hold the tax to be one on property, and it is conceded that, if it be such, it is invalid under the state constitution, we have no occasion to consider whether it would be also invalid under the state constitution as a license or excise tax, because confiscatory." (p. 294)

It is firmly established that an excise tax may be imposed upon business and occupations of various kinds. But this court in the case just cited draws the distinction between a tax

on a *business* and a tax upon the exercise of an ordinary act of ownership of property. The right to give property away, to part with the title to it, in so far as it does not require the aid of any legal machinery or assistance of governmental functions or regulations, is inherent in the dominion of the owner over his property. The law cannot require him to keep it. But, if it can tax his right to give it away without the limitations which apply to property taxation, it may virtually make the exercise of the right prohibitive, and practically destroy the right.

Knowlton vs. Moore, supra.

On the other hand, if it is a property right the power of taxation with respect to it is limited by the rules which apply to property taxation and it is entitled to the protection afforded to property rights and natural rights by the guaranties of the federal constitution.

It is difficult, if not impossible, to define property in the legal sense without including in the definition the power of disposition.

As said by the Court of Appeals of New York in *Wynehamer vs. People*, 13 N. Y. 378, 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm. 138): 'The third absolute right of every Englishman, is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Comm. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things or giving them away to any person without consideration, or even throwing them away.' Bouv. Law Dict. tit. Property. These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale,

> and placed without the protection of law, it were well that the attempt should be made."

And in *Ruling Case Law*, Volume 26, Section 19, at page 36:

> "A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself. So that a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed *on the right of ownership* which is not also a tax on property." (Italics ours)

And again, Sec. 210, at p. 237:

> "An imposition in the form of an excise cannot be sustained as such if it is merely an indirect method of levying a property tax, and accordingly it has been held that a tax upon the business of extracting turpentine from standing trees is unconstitutional. Likewise a tax of a certain per cent upon every judgment entered in a court of record has been held invalid on the ground that the legislature cannot arbitrarily impose a burden on the right to litigate disputed claims." 26 *Ruling Case Law*, p. 237, Sec. 210.

In *Dawson vs. Kentucky Distilleries & Warehouse Co., supra*, as part of the grounds of the decision that the tax was on the property, the court said, that while the tax was made primarily payable by the warehouseman, the state was given a lien upon the warehouse and the whisky therein; that the warehouseman could get reimbursement through subrogation to the state's lien on the whisky belonging to the owners, so that the whisky itself must ultimately bear the burden of the tax.

So in this case, the statute (Sec. 72.05, ante p. 2) makes the tax a lien upon the property transferred until paid. The liability for the tax is thus imposed directly upon the property transferred.

The tax is imposed at a progressive rate which could not be justified except on the theory that the legislature has practically a free hand to impose the tax at any rate it pleases even to the point of confiscation of the property.

The section of the statute as to rates, omitting parts not material is as follows:

"72.02 *Primary rates, where not in excess of twenty-five thousand dollars.* When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in Section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

(1) Two per centum, etc. * * * * *

"72.03 Other rates, where in excess of twenty-five thousand dollars. * * * * * * * * * * * *

(1) * * * * Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

(2) * * * * Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, three times the primary rates.

(3) * * * * Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars, four times the primary rates.

(4) * * * * Upon all in excess of five hundred thousand dollars, five times the primary rates."

As to the limitations upon the legislature in property taxation as held by the supreme court of the state in *Beals vs. State*, 139 Wis. 544, 557:

"As to the taxation of property there can be no classification which interferes with substantial uniformity of rate base on value."

"As to excise taxation there may be proper classification and different classes and *the term 'uniformity of taxation' means simply taxation which acts alike on all persons similarly situated.*

"The inheritance tax levied by Chapter 44 Laws of 1903 is not a tax upon the property or property rights in any sense, but merely an excise tax levied upon the transfer or transaction and merely measured in amount by the amount of property transferred." (Italics ours)

There has been no modification in this state of the rules laid down in this decision.

POINT IV.

TO ANNUL THE AMENDMENT WILL RESULT MERELY IN LEAVING THE STATUTE IMPOSING THE TAX ON INHERITANCES AND GIFTS MADE IN CONTEMPLATION OF DEATH, AS IT WAS BEFORE THE AMENDMENT, WITHOUT SERIOUS CONSEQUENCES TO THE STATE.

As will be seen by reference to the statutes (ante pp....) the law making the classification and imposing the tax was complete before the Amendment. The only purpose of the amendment was to make *an arbitrary rule* bringing certain cases within the basis of classification *regardless of the facts* and some of which are precisely antithetical to the basis of classification. While numerous estates have been administered and closed under the law since the amendment, no recovery of any inheritance taxes paid on gifts *inter vivos* could be had without satisfactory proof that the gift was not made in contemplation of death, and only then as matter of legal right where the payment was made under protest and the statute of limitations has not expired. To annul the amendment, will promote the ends of justice and work no injustice.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the state court should be reversed and the provision of the law in question held to be unconstitutional and void.

CHARLES F. FAWSETT,

Counsel for Plaintiffs in Error.

FILE COPY

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 556 146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

CHARLES F. FAWSETT,
Counsel for Plaintiffs in Error.

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 556

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

Solely with the view to pointing out the respects in which the brief for the state of Wisconsin seems to confuse the issue and may therefore possibly be misleading, we ask the privilege of filing this reply brief.

We are unable to understand from the state's brief whether counsel accepts the construction placed on the statute in question by the opinion and decision of the state court here under review, or whether he is relying on the grounds of the decision upon which the statute was sustained in the previous case of *Estate of Ebeling*, 169 Wis. 432.

As the construction placed on the statute in the case under review is materially different from the grounds on which the statute was sustained in the *Ebeling* case, it is my understand-

ing that the construction placed upon the statute in this case supersedes the grounds of the decision in the *Ebeling* case in so far as the two are different or inconsistent.

The grounds upon which the statute was sustained in the *Ebeling* case are stated in the opinion as follows:

> "It is said that the legislature cannot declare a gift to be in contemplation of death when it in fact is not so. It is admitted, however, that the legislature may tax gifts *inter vivos*. Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos*, they are not beyond the power of the legislature to tax. If they be considered gifts *inter vivos* there is abundant justification for the classification here made in segregating them from other gifts *inter vivos* as objects of taxation, the basis for such classification being the purpose to make the law taxing gifts made in contemplation of death effective." (196 Wis. p. 436)
>
> 169

In the case here under review, when the case was before the State Court, that court was asked to reconsider the grounds of the decision in the *Ebeling* case and to overrule that decision (Rec. 43). As indicated by the opinion, the court did reconsider the grounds of the decision in the *Ebeling* case, and while it did not overrule the decision it materially modified the grounds upon which it was based *and adopted a construction of the statute which is directly opposed to the ground on which it was sustained in the Ebeling case.*

As indicated above, in the *Ebeling* case the court entirely avoided the question whether the legislature has the power to establish by arbitrary declaration a gift to be made in contemplation of death for the purposes of an inheritance tax when in fact it is not so made, by holding in that case that the statute could be sustained by considering it as imposing the tax on a certain class of gifts *inter vivos* as such, as well as upon gifts made in contemplation of death.

When the case *here under review* was before the state court the ruling of the court in the *Ebeling* case that the statute could be sustained as a tax on gifts *inter vivos* as a separate class *in conjunction* with the tax on gifts made in contemplation of death, was the main point of the attack on that case.

In the opinion in this case, the court while adhering to the decision in the *Ebeling* case reverses or corrects the ground upon which that case was decided, in the following language:

"The second objection that the basis of classification was wrong because there are two classes, one of gifts made in contemplation of death, and another of gifts made within six years though not in contemplation of death, misinterprets the legislative intent. Such intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death, bringing such gifts within the only class created, namely gifts made within contemplation of death. Waiving the question of whether the legislature could bring gifts made within six years within the class, it is quite obvious that only one class is created and that a valid one, for gifts made in contemplation of death stand upon a different basis than ordinary gifts made *inter vivos*." (Rec. 44, 45)

"We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event." (Rec. 47)

This court is bound by the meaning and construction thus given to the statute by the State Court. *Stebbins vs. Riley*, 45 S. C. R. 424 at p. 427.

In the subsequent reasoning of the court, the grounds of the decision in the *Ebeling* case were sustained only in so far as it held the statute to create a conclusive presumption or rule of construction and not merely a rebuttable presumption. It thus seems apparent as pointed out in our principal brief, that as finally construed by the state court, the statute creates but one class of gifts *inter vivos* for the purpose of the tax, and that is, gifts made in contemplation of death; that the tax is imposed *as an inheritance tax* and not as a tax on a certain class of gifts *inter vivos* segregated from other gifts *inter vivos* as objects of taxation regardless of whether made in contemplation of death or not; and that the ground upon which the power of the legislature to impose the tax on such gifts is that the tax imposed is "*a tax upon the right to receive property from a decedent.*" (Rec. 44)

This would seem to bring us face to face with the first question discussed at length in our principal brief, namely, whether the legislature has the power by its mere fiat to declare that a

large class of gifts which were not in fact made in contemplation of death were so made for the purpose of imposing upon them *an inheritance tax* the same as is imposed on gifts in fact made in contemplation of death.

Counsel for the state does not meet this question. On the question of classification the state seems to rest its case entirely on an extract from a recent opinion of this court in which it is said:

> "It is not necessary that the basis of the classification should be deducible from the nature of the thing classified. It is enough that the classification is reasonably founded in the purposes and policies of taxation." (*Stebbins vs. Riley*, 45 S. C. R. at p. 426.)

The only attempt that is made to show that the classification in this case is *reasonably founded* in the purposes and policies of taxation is a reiteration of the statement in the opinion of the ~~trial~~ court that the purpose of the statute was to relieve the state from the necessity of making proof of the fact that a gift was made in contemplation of death in all cases where the donor happens to die within six years after making the gift, coupled with the surprising assertion that the average citizen and those whom he leaves behind when he dies are so dishonest that nothing short of a conclusive presumption will make it possible for the state to collect the tax on gifts actually made in contemplation of death.

This does not seem to involve any policy of taxation but rather a policy of distrust of the honesty of the average citizen. I hope that this court will not feel bound by either the opinion of counsel for the state or of the legislature of the state of Wisconsin on that subject.

We do not understand that in the use of the language above quoted this court intended to announce any new principle. As we understand it, the language referred to was directed to *the basis of the classification* and was not intended to be all inclusive and to cover the entire subject of the requisites of a valid classification. We do not understand that the general principles by which this subject is governed are now open to controversy in this court. According to these principles as we understand them, in addition to a proper *basis of classification* there are other requisites to make the classification a valid one. One of such other requisites is that all of the members of the class made subject to the tax must be properly related to the basis of the classification.

In this case we have no fault to find with the basis of the classification, if we are correct in understanding the state court to finally hold *that it is confined to gifts made in contemplation of death.*

The objections here raised are, that the statute prior to the amendment having established that basis of classification which is an entirely proper one, *deducible from the nature of the things classified*, the amendment arbitrarily imports into it cases which are directly opposed to the basis of classification; and to make the matter worse, makes a purely arbitrary and capricious selection of the cases so improperly imported while leaving out all other cases of the same kind as those which are brought in. There is apparently no answer to these objections in the brief of counsel for the state.

Respectfully submitted,

CHARLES F. FAWSETT,
Counsel for Plaintiffs in Error.

FILE COPY

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES

COPY OF PROVISIONS OF WISCONSIN INHERITANCE TAX STATUTES RELATING TO RATES.

CHARLES F. FAWSETT,
Counsel for Plaintiffs in Error.

(Burdick-Allen Company)

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 146

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES

COPY OF PROVISIONS OF WISCONSIN INHERITANCE TAX STATUTES RELATING TO RATES.

Upon the oral argument of the above case, the Chief Justice requested that the court be furnished with a printed copy of the entire provisions of the Inheritance Tax Statutes of Wisconsin relating to rates. The following copy of the Statutes is in compliance with that bequest.

The above named decedent died January 3, 1921. At that time, the Statutes in relation to the matter of rates in force as shown by *Wisconsin Statutes*, 1919, Chapter 64ff., were as follows:

> "*Subjects Liable.* Section 1087-1. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, associa-

tion or corporation, except county, town or municipal corporations, within the state for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

* * * *

Primary Rates, where not in excess of twenty-five thousand dollars. Section 1087-2. When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 1087-4, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

One per centum, where. (1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child, at the rate of one per centum of the clear value of such interest in such property.

Two per centum, where. (2) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of two per centum of the clear value of such interest in such property.

Three per centum, where. (3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of three per centum of the clear value of such interest in such property.

Four per centum, where. (4) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother or a descendant of the brother or sister of the grandfather or grandmother of the decedent, at the ate of four per centum of the clear value of such interest in such property.

Five per centum, where. (5) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of five per centum of the clear value of such interest in such property.

Other rates, where in excess of twenty-five thousand dollars. Section 1087-3. The foregoing rates in section 1087-2 are for convenience termed the primary rates.

When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

Rate where amount twenty-five thousand dollars to fifty thousand dollars. (1) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

Rate where amount fifty thousand dollars to one hundred thousand dollars. (2) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars three times the primary rates.

Rate where amount one hundred thousand dollars to five hundred thousand dollars. (3) Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars four times the primary rates.

Rate where amount over five hundred thousand dollars. (4) Upon all in excess of five hundred thousand dollars five times the primary rates.

Tax not to exceed fifteen per cent. (5) No such tax, however, shall exceed fifteen per cent of the property transferred to any beneficiary."

At the bi-annual session of the legislature which convened in January, 1921, *the rates as shown by chapter* 72 *Wisconsin Statutes* 1921, *were increased as follows*:

"72.02 *Primary rates, where not in excess of twenty-five thousand dollars.* When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

(1) *Two per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child, at the rate of two per centum of the clear value of such interest in such property.

(2) *Four per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of four per centum of the clear value of such interest in such property.

(3) *Six per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of six per centum of the clear value of such interest in such property.

(4) *Eight per centum, where.* Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of eight per centum of the clear value of such interest in such property.

72.03. *Other rates, where in excess of twenty-five thousand dollars.* The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or in-

terest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(1) *Rate where amount twenty-five thousand dollars to fifty thousand dollars.* Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

(2) *Rate where amount fifty thousand dollars to one hundred thousand dollars.* Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars three times the primary rates.

(3) *Rate where amount one hundred thousand dollars to five hundred thousand dollars.* Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars four times the primary rates.

(4) *Rate where amount over five hundred thousand dollars.* Upon all in excess of five hundred thousand dollars five times the primary rates."

The limitation of the maximum tax to fifteen per cent in the previous law was repealed by Chapter 568 of the laws of 1921.

CHARLES F. FAWSETT,
Counsel for Plaintiffs in Error.

FILE COPY

(28,522)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 146

(October Term, 1924, No. 925)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
Counsel for defendants in error.

SUBJECT INDEX

TABLE OF CASES CITED

TEXT BOOKS CITED

STATUTE CITED

(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 146

(October Term, 1924, No. 556)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MacCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE

INTRODUCTORY STATEMENT.

The case is on writ of error to review a judgment of the Supreme Court of the State of Wisconsin dated May 6, 1924 (R. 42), officially reported in Vol. 184, Wisconsin Supreme

Court Reports, at pp. 1 to 10, inclusive, holding valid the provision of the Wisconsin inheritance tax law enacted in 1913 declaring that "every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of" the law imposing a tax on the transfer of property made in contemplation of the death of the grantor, vendor or donor (Wis. Stats. 72.01) and sustaining a tax on the transfer by gift of property made within such six year period but not made in actual contemplation of death.

The provision of the Wisconsin statute above quoted was assailed in the court below, and the judgment of the Wisconsin Supreme Court is attacked here, by plaintiffs in error as being in contravention of the Fourteenth Amendment to the Constitution of the United States, sec. 1, on the ground that it deprives them and the recipients of such gifts of their property without due process of law and that it denies to them the equal protection of the laws.

The relevant parts of the statute involved are quoted on page 2 of the brief of the plaintiffs in error, and, are also set out in an appendix to this brief.

SINGLE QUESTION INVOLVED, AND THE STATE'S POSITION, STATED.

In the last analysis, the single question presented by the case is,

May a state, in the exercise of its sovereign and undoubted power to tax the right to receive property from a decedent, say, on grounds of public policy, and for the purposes of classification for the practical administration of its inheritance tax law, that all gifts made within a certain reasonable period (here six years)—although some be made not in actual contemplation of death—shall, for taxation purposes, be construed (or declared) to fall within the class of gifts made in contemplation of death taxed by the law, without

violating the due process of law and equal protection of the laws clauses of the Federal Constitution?

The state contends that the correct answer is in the affirmative, as given by the Wisconsin Supreme Court by the judgment below.

ARGUMENT.

THE CLASSIFICATION FOR THE PURPOSES OF THE INHERITANCE TAX OF ALL GIFTS MADE WITHIN A REASONABLE TIME BEFORE THE DONOR'S DEATH AS GIFTS MADE IN CONTEMPLATION OF DEATH IS AN ADMINISTRATIVE NECESSITY, AND HAS SUCH A SUBSTANTIAL RELATION TO THE OBJECT OF THE TAXING STATUTE THAT IT IS REASONABLY FOUNDED IN THE PURPOSES AND POLICIES OF TAXATION, AND IS THEREFORE VALID; AND THE IMPOSITION OF TAXES ACCORDINGLY NEITHER TAKES PROPERTY WITHOUT DUE PROCESS OF LAW NOR DENIES THE EQUAL PROTECTION OF THE LAWS TO THE RECIPIENTS OF SUCH GIFTS.

It is not claimed that the state is without constitutional power to place gifts of property *inter vivos* made in contemplation of death in the same class with transfers of property by will or descent for the purposes of inheritance taxation. Neither is the power of the state to tax all transfers *inter vivos* denied. The power of the legislature to impose an excise tax upon the recipient of all transfers of property *inter vivos*, made with or without adequate valuable consideration, and whether made in contemplation of death or otherwise, must be conceded—it cannot be successfully challenged.

Hatch v. *Reardon*, 204 U. S. 152, 159.

What is claimed is, that the classification of all gifts *inter vivos* made within a fixed period of the death of the donor as gifts made in contemplation of death irrespective of the actual fact is arbitrary, capricious and unreasonable; and that the taxation of the right to receive gifts within the period so fixed which were not made in

actual contemplation of death, while not taxing like gifts made without the period, constitutes the taking of the property of plaintiffs in error without due process of law, and denies to them the equal protection of the law.

Many pages of argument and citations of and quotations from the books are given by plaintiffs in error in their brief to sustain this contention, which they divide into parts I, II and III; but the argument as a whole, and in its several parts, not wholly, but practically ignores the one outstanding and controlling consideration, that the purpose of the classification made by the statute is an administrative necessity, grounded in public policy, which, *when* considered, as clearly pointed out in the opinion of the state court (R. 42, 44-47; 184 Wis. 1, 6-10), makes the classification reasonable and valid as "having a fair and substantial relation to the object of the legislation," which, it is settled by many decisions of this court, is a sufficient basis for a classification for taxation purposes. As is said in one of the latest of such decisions, in which the former cases are referred to and commented upon, "It is not necessary that the basis of the classification should be deducible from the nature of the thing classified. *It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.'*" (Italics ours.)

> *Stebbins* v. *Riley*, 267 U. S. ——; 69 L. ed. 456; 45 S. Ct. Rep. 424.

The classification here questioned was clearly made, as we shall show, in the exercise of legislative judgment and discretion, for the legitimate purpose of preventing a common and effective method (adopted particularly by men of wealth) of evasion of the inheritance taxes imposed upon the recipients of transfers of property by will or descent; and the fact that that classification results in the discrimination complained of between gifts made within the six year period and those made without that period, is no objection to the classification when viewed in the light of the object and purpose of the legislature in making it.

> *Stebbins* v. *Riley*, *supra*.

The argument of plaintiffs in error might and probably would be held to be sound were we dealing with a general tax upon transfers of property *inter vivos* as such. But that is not the kind of tax nor a classification for the purposes of such a tax that is involved. We therefore deem it unnecessary to reply to that argument *in extenso;* it is, we think, effectively answered by the settled rule above stated, and by Chief Justice Vinje, speaking for the court below, in the opinion printed in the Record (pp. 42-47)—substantially all of which is also printed in the brief on the other side, and need not be repeated in ours—and by Justice Owen for the same court in the opinion in the prior case of the *Estate of Ebeling*, the material part of which we shall presently quote in full.

We may accept for the most part the statements of the general principles governing the classification of persons and things for legislative purposes contained in the brief for plaintiffs in error without at all endangering the contention that the classification involved here is reasonably founded in the purposes and policies of the inheritance taxation laws of the state, and that the judgment of the court below is therefore right.

THE BACKGROUND OF INDUCEMENT FOR AND THE OBJECT AND PURPOSE OF THE QUESTIONED ENACTMENT.

The inducement for and the object and purpose of the amendment to the inheritance tax law involved here is well stated in the case of *Estate of Ebeling*, 169 Wis. 432, 434-437, as follows:

> "The state contends that the amendment makes every gift of a material part of the estate of a deceased person, when made within six years prior to death, subject to an inheritance tax. It is the contention of the respondents that the amendment does not have such conclusive effect, and that it accomplishes no more than to make the gift, when made within six years prior to death, *prima facie* evidence of the fact that it was made in contemplation of death, thereby shifting the burden of proof upon that question.

"In the case of *State* v. *Thompson*, 154 Wis. 320, 142 N. W. 647, this court had under consideration the question of inheritance taxes due from the estate of one Joseph Dessert, who died at the age of ninety-two. Practically his entire estate was devised to his only daughter and sole heir, Stella D. Thompson. She took by the will about $200,000. During the last six years of his life he gave her approximately a half million dollars, mainly in two gifts, one made three years and the other four and one-half years prior to his death. This court held that the gifts were not subject to inheritance taxes. *The circumstances of that case forcibly brought to the attention of the legislature the fact that after a person had attained the age of eighty-nine years, an age when he could not expect to live many more years, when his thoughts, naturally, were consumed rather with the disposition of property already accumulated than with the accumulation of more, he could bestow his property upon the objects of his bounty and thus evade the inheritance tax.* This decision was rendered May 31, 1913. The legislature was then in session. Ten days thereafter Senate bill No. 575 was introduced by the Joint Committee on Finance. This bill, without amendment, was approved July 21st and became ch. 643, Laws 1913. [This is the enactment attacked by plaintiffs in error.]

"Now the question is this: Did the legislature intend to make gifts and transfers of property, made within six years prior to death, absolutely taxable, or was it simply providing a rule of evidence? There can be little doubt that the legislation was prompted by the decision in the *Thompson Case*. That was a case in which the state was a party. It was regarded as an important case, not only because of the amount involved but as a precedent. The contention of the state was rejected by the court. It seems quite reasonable to suppose that the legislature in enacting the amendment intended to do what it could in the way of moulding into law the doctrine contended for by the state in that case. *If it intended to make the gift or transfer occurring within six years prior to death only prima facie evidence of the fact that it was made in contemplation of death, the legislative response was certainly weak and puerile.* In cases where the facts are easily ascertainable the burden of proof is of the merest advantage. It is only in cases where the proof is difficult to obtain, such as violations of the excise laws, where a rule of law constituting certain evidence a *prima facie* case is

of real advantage. *With such a construction the amendment would not have changed the result of the Thompson Case, and we may well believe that the purpose of the legislature was to prevent such a recurrence.*

"It is clear to our minds that the legislature intended to define what should constitute a transfer in contemplation of death. *It was the legislative purpose to make the statute effective.* It realized that if a person after reaching the age of eighty or ninety years could dispose of his property free from the tax, it could be easily evaded by those possessing the larger fortunes. So it was enacted not only that the tax should apply to gifts made in contemplation of death but also to gifts made within six years prior to death.

"It is said that the legislature cannot declare a gift to be in contemplation of death when it in fact is not so. It is admitted, however, that the legislature may tax gifts *inter vivos.* Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts *inter vivos,* they are not beyond the power of the legislature to tax. If they be considered gifts *inter vivos* there is abundant justification for the classification here made in segregating them from other gifts *inter vivos* as objects of taxation the basis for such classification being the purpose to make the law taxing gifts made in contemplation of death effective. It is recognized that in enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves a subject of police regulation where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. *Pennell* v. *State,* 141 Wis. 35, 123 N. W. 115. While a principle relating to police regulation does not necessarily apply to the power of taxation, no reason is perceived why the legislature may not, as here, make a classification of gifts *inter vivos* and subject them to taxation for the purpose of making effective taxation of gifts *causa mortis.* That it will occasionally result in the taxation of gifts not in fact made in contemplation of death, which may be conceded, should not condemn the classification if the classification be reasonably necessary to carry out the legislative scheme for the taxation of gifts *causa mortis.* Nor should it be condemned because there is no material distinction between those who fall immediately upon one side of the

line and those who fall immediately upon the other, as illustrated by the fact that a gift one day less than six years prior to death is taxable, while a gift made one day more than six years prior to death is not taxable. That is always the case where the classification is of necessity fixed by an arbitrary line of demarcation. As said in *State* v. *Evans*, 130 Wis. 381, 110 N. W. 241:

> 'Neither need we be disturbed by the fact that the line of demaraction between the classes is arbitrary. Wherever there is a sliding scale of age, population, demension, distance, or other characteristic which is believed to justify classification, necessarily the division between classes must be arbitrary, and legislation is not to be declared void which adopts the age of twenty-one as marking the right to vote or manage property because the individual at twenty years and eleven months may be as competent as at twenty-one, nor, in a law distinguishing by population, because no appreciable difference can be conceived between the town of 999 and the town of 1,000, provided, generally, the class of those under twenty-one years of age are less competent to vote or manage property than the class of mankind above that age, or the class of towns which do not include villages of 1,000 population are generally less in need of the governmental powers conferred upon villages than the class of towns which do contain villages of 1,000 and upward.'"
> (Italics are ours.)

In connection with the history of the legislation as given by the state supreme court in the foregoing quotation, it may be noted also that the Wisconsin Tax Commission, (which is charged with the duty of administering the inheritance tax law) in its official biennial report to the governor and the legislature of the state, under date of December 3, 1912, and laid before the legislature of 1913, which enacted the statute in question, made several recommendations for amendments to the law based upon its experience with the difficulties of enforcement, among which, was the following:

> "3. Providing more definitely for the taxation of transfers made in the form of gifts, grants, and donations when such transfers are in the nature of a final disposition or distribution of

the estate of the donor or of a material part thereof. The general purpose of the law is to impose a tax upon the passing of estates from the ancestor to his successors. At present large estates or large portions of an estate may be, and frequently are, conveyed during the latter years of the owner's life to his children, in a manner that is clearly testamentary in its nature, yet that cannot readily be proved to have been made either in contemplation of death nor to evade the tax. The law should be made as broad in its language as it is in its purpose."

Referring to the precise statute involved in this case and the decision in the *Ebling* case, quoted from at length above, it is said in 3 R. C. L. Suppl. 1460:

> "A statute imposing a tax on all gifts made within six years of the death of decedent is constitutional. The legislature might tax all gifts *inter vivos*, and there is abundant ground for classifying gifts *inter vivos* in this way, *the purpose being to make the law taxing gifts in contemplation of death effective.*"

The Wisconsin court again had this statute before it in the case of *In re Uihlein's Will* (not yet officially reported) 203 N. W. 742, in which, in addition to the grounds of attack here urged, it was further assailed on the ground that the period of six years fixed by the law is unreasonable. But the statute was upheld for the third time, the court saying:

> "The counsel for appellants claim that our statute, conclusively presuming that gifts made within six years of the testator's death are made in contemplation of death, is unconstitutional; but they frankly state they do not desire to offer any argument on the questions that were settled in the cases of *In Re Estate of Ebling*, 169 Wis. 432, and *In Re Estate of Schlesinger*, 184 Wis. 1, in addition to the arguments presented in those cases but desire to urge that the period fixed, namely six years, is an unreasonably long period, and for that reason the statute is unconstitutional, as well as for the reasons urged in the former cases. *As stated in the Schlesinger case the statute was enacted for the purpose of enabling the taxing officials of the state to make an efficient and practical administration of the inheritance tax law.* If the legislature had the right to make a conclusive

presumption it was undoubtedly within the legislative field to determine the period within which such conclusion should be considered absolute. Unless the period of six years is so excessive and unreasonable that it can be said that it was beyond the legislative field courts cannot interfere. In our judgment the legislature did not pass beyond its field in fixing upon the period of six years. Common experience and observation show that many men of advancing years begin to make a testamentary disposition of their estate in the way of gifts and that such action may continue over quite a number of years. At any rate it was for the legislature to determine the length of the period and we cannot say judicially that it is so long as to be unreasonable." (Italics ours.)

A REBUTTABLE PRESUMPTION WOULD BE INEFFECTUAL.

Plaintiffs in error seem to concede that if the statute created a rebuttable presumption, it would be justified and valid, but ask, "Wherein was the necessity for a conclusive presumption?" (p. 23). Our answer is that a rebuttable presumption would be ineffectual to accomplish the object of the statute, namely, that of enforcing the purposes and policies of taxation.

It is true that the federal estate tax law and the succession and inheritance tax laws of several of the states, in the attempt to prevent evasion of the tax, establish merely a presumption that transfers made without consideration during a limited period before death *"prima facie,"* or "unless the contrary be known," are made in contemplation of death. But such a rebuttable presumption, it was soon found, really amounts to nothing ineffectuating the tax designed to be imposed upon *all* transfers in the nature of testamentary disposition of property, because all of the evidence on the issue is in the possession of the personal representatives or the beneficiaries of the decedent, and none of it is likely to be available to the taxing officials. Experience has shown that the practical advantage of creating a rebuttable presumption, merely, has been almost *nil*, for under such a presumption the estate or beneficiaries are only required to prove a negative, which

everyone knows requires very little evidence to support. The *rebuttable presumption leaves the door of opportunity for evasion of the tax practically as wide open as it is without any presumption at all.* Under such a presumption it is perfectly easy for the ingenious man (and it does not take much ingenuity either) who is bent on evading the tax for the benefit of his estate and the recipients of his bounty to conceal his state of mind and his knowledge of bodily infirmity, or fears of such, which move him to consider the question of the disposition of his property among his kin, from the world, and by studied acts and conduct at or about the time that he gives away his property while still alive, create or leave sufficient evidence to enable his estate to prove the negative and so rebut the presumption.

And so, with common knowledge of the successful evasion of the tax before them, the legislatures of a number of the states besides Wisconsin have determined that it is necessary to the enforcement of their inheritance or succession tax laws to put all gifts made within a certain determined period (varying from two to six years) before death in the class of those made in contemplation of death, and to declare that all gifts made within such period shall be so deemed or construed. The following are some of these states, the references being to the pages of Gleason and Otis on Inheritance Taxation (4th Ed. 1925), where the text of the provisions of the state statutes may be found:

Arizona, six years, p. 971; Arkansas, three years, p. 989; Kentucky, three years, p. 1088; Mississippi, two years, p. 1150; Missouri, two years, p. 1158; North Carolina, three years, p. 1216; North Dakota, six years, p. 1224; South Carolina, five years, p. 1290; Tennessee, two years, p. 1308; West Virginia, three years, p. 1336.

Judge McElroy, in his valuable work on "The Law of Taxable Transfers" (2d Ed.) at page 109, said:

> "A provision in the statutes fixing a definite time prior to death, within which gifts would be deemed 'made in contemplation of death,' would settle all contentions in respect to gifts of

> this kind, but as yet the wisdom, or even the necessity, of such a provision has not received the consideration of the legislature."

This was written in 1909. Since then experience in the administration of the inheritance tax has forced upon the attention of legislature after legislature both the necessity and the wisdom of writing such a provision into the tax law. Since the publication of the 3d edition of Gleason and Otis in 1922, at least five states have written the provision into their law, namely, Arizona, Arkansas, Kentucky, Mississippi and North Carolina.

We believe that it is perfectly obvious that without this means of enforcement, the state is powerless to prevent the successful evasion of the taxes intended to be imposed, and that the provisions for the taxation of transfers made before death but which are in the nature of testamentary disposition of property may as well, for all practical purposes, be written off the statute books.

The average citizen has a peculiar complex, and little conscience, with reference to his obligation to contribute to the maintenance of his government, public works, and institutions by the payment of taxes. The greater his means, with the resulting greater ability to pay, the stronger seems to be his opposition. He gets infinitely more in return for what he pays out, in the way of protection, safety, comfort, health and pleasure and happiness, than from any other expenditures he makes for his business, his home or his family; yet immediately on the passage of a taxation measure, he proceeds, with the help of the best legal talent he can obtain, to devise ways and means to evade the obligations imposed upon him by it, and legislative bodies and administrative officers, and the courts as well, are kept busy in the attempt to checkmate his schemes of evasion: witness the elaborate provisions of the laws and the rules and regulations under them in the taxing machinery of both the federal and state governments. The development of the inheritance (transfer, succession or estate) tax, which is recognized as a particularly just form of taxation which falls only on those best able to pay, is comparatively speaking, very recent. At first all that was provided for was a

tax on the devolution of property by will or descent, but evasions were so easy that it shortly had to be extended to gifts of property to take effect at or after death, and then to gifts presently made in contemplation of death. But this mere extension of the subjects of the tax was found not to be of very great aid in the enforcement, and the rebuttable presumption that a gift made within a fixed period before death was in contemplation of such death was added. This, too, has proven ineffective, and the latest development is the provision of the law involved in this case. Legislatures meet infrequently and act slowly in meeting the problems which the successful evasion of taxation produces, and the constitutionality of every legislative attempt to solve such problems is vigorously assailed in the courts. Otherwise, doubtless many other states would long ere this have enacted an enforcement provision similar to the one we have under consideration.

STATUTE FOUNDED IN THE PURPOSES AND POLICIES OF TAXATION.

We think it appears clearly enough that the classification which the statute makes is so substantially related to the object of the taxing law that it must be upheld by this court, as it was by the state court, as reasonably founded in the state's purposes and policies of taxation.

Watson v. *Comptroller*, 254 U. S. 122.

On page 26 of their brief, plaintiffs in error say that "there is no rule of public policy in the state of Wisconsin against the making of gifts, *generally speaking*." Granted! But it does not follow that there is no question of public policy or state policy involved in the question before the court, as they also claim. The state's *policy of taxation* is the very thing that is before the court.

FOURTEENTH AMENDMENT NOT VIOLATED.

Plaintiffs in error do not complain of the *amount* of the tax imposed, but only of the imposition of any tax at all. There is there-

fore no taking of property without due process of law. This court has said in *Dane* v. *Jackson*, 256 U. S. 589, 599:

> "Where, as here, conflict with Federal power is not involved, a state tax law will be held to conflict with the 14th Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefits received, as to amount to the arbitrary taking of property without compensation,—'to spoilation under the guise of exerting the power of taxing.' 134 U. S. 237; 173 U. S. 615; 239 U. S. 220, *supra*. For other inequalities of burden or other abuses of the state's power of taxation, the only security of the citizen must be found in the structure of our government itself".

and this statement was referred to in the late case of *Stebbins* v. *Riley*, 267 U. S. ——, *supra*, where Mr. Justice Stone said:

> "It has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property."

except under the conditions referred to in *Dane* v. *Jackson*.

Nor, if the classification for the purposes of taxation made by the statute is germane to the purpose and policies of the taxing law, can there be any ground for the claim of plaintiffs in error that they are denied the equal protection of the laws, because all persons coming within the class are treated with exact equality. Quoting again from *Stebbins* v. *Riley*, 267 U. S. ——, *supra*:

> "The taxing statute may, therefore, make a classification for fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation."

citing *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283 and *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

Then, too, it seems too plain to require argument that the fundamental nature of the excise tax imposed by the law is not changed

by the classification so as to make it a property tax and subject to the rule of uniformity of taxation. The tax imposed upon those coming within the class is still a tax upon the right to receive property, and not upon the property itself, nor even upon the right to dispose of property, although if it were the latter, it would still remain an excise tax.

Stebbins v. *Riley*, 267 U. S. ——, *supra*.

CONCLUSION.

It is respectfully submitted that the judgment of the Wisconsin Supreme Court should be affirmed.

HERMAN L. EKERN,
Attorney General.

FRANKLIN E. BUMP,
Assistant Attorney General,
Counsel for defendants in error.

APPENDIX.

(Ch. 44, sec. 1, Laws of Wisconsin for 1903 as amended by ch. 643, Laws of Wisconsin for 1913.)

Section 72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town, or municipal purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

(1) By a resident of state. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) Nonresident's property within state. * * *

(3) In contemplation of death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section.

(4) When imposed. * * *

(5) Transfer under power of appointment. * * *

(6) Joint estates. * * *

(7) Insurance part of estate. * * *

(8) On clear market value. * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 146

(OCTOBER TERM, 1924, No. 556)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MACCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, *Plaintiffs in Error,*

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE FOR REHEARING.

HERMAN L. EKERN,
Attorney General,
FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants-in-Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 146

(OCTOBER TERM, 1924, No. 556)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MACCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, *Plaintiffs in Error*,

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE FOR REHEARING.

The State of Wisconsin and county of Milwaukee, defendants in error, by Herman L. Ekern, Attorney General, and Franklin E. Bump, Assistant Attorney General, their counsel, respectfully move for the rehearing

in this cause, which was decided on March 1, 1926, on the following grounds:

1. THREE DAYS BEFORE THE JUDGMENT WAS ENTERED CONGRESS PASSED AND THE PRESIDENT APPROVED A LAW SIMILAR TO THE WISCONSIN STATUTE DECLARED VOID.

2. IF THE DECISION SHALL STAND, THE UNITED STATES REVENUE ACT OF 1926 MUST FALL, IN PART OR IN WHOLE.

3. SHOULD NOT THE UNITED STATES GOVERNMENT HAVE THE OPPORTUNITY TO BE HEARD BEFORE DECISION BECOMES FINAL?

4. SHOULD NOT THE STATES OTHER THAN WISCONSIN HAVING SIMILAR LAWS BE ACCORDED A LIKE PRIVILEGE?

5. IF ANY MODIFICATION OF THE PRINCIPLE ANNOUNCED IN THIS DECISION IS TO BE MADE, SHOULD IT NOT BE MADE NOW SO THAT THE PRESENT CASE MAY BE DECIDED ACCORDINGLY.

More particularly, it is respectfully suggested:

That the decision is in error in holding (a) that the Legislature may not in the exercise of judgment and discretion as a proper classification provide that gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are conclusively presumed to have been so made without regard to actualities while like gifts at other times are not thus treated, and (b) that all gifts or, indeed, any gift with-

out testamentary character may not be subjected to graduated taxes.

That the decision imperils the validity not only of paragraphs (c) and (d) of sec. 302, which creates a conclusive presumption (similar to the Wisconsin Statute held void in this case) as a part of the estate tax provisions of the new revenue act of the United States passed by Congress and approved by the President on February 26, 1926, but also of the repeal of the gift tax feature of the old revenue act of 1924 (sec. 319), and perhaps of the entire amendment of the estate tax provisions, if the enactment of sec. 302 for the effective enforcement of the estate tax was a substantial inducement for the repeal of the gift tax and the reduction of the taxes imposed by the 1924 act.

This motion assumes that the attention of the court had not been called to said sec. 302 at the time this cause was decided (the case having been argued and submitted on January 18, 1926), and the suggestion is most respectfully made by this motion that if the principle of constitutional law laid down by the majority of the court in this case is to stand, it should be allowed to become final only after reargument and an opportunity afforded to the United States Government, as well as to the other States of the Union having similar provisions to the Wisconsin law involved, to be heard, *amici curiae*, because of the far-reaching effect the ultimate decision will have upon both Federal and State taxation policies.

A motion for rehearing has been granted on the ground that the decision would determine the rights of numerous parties situated as the appellee in whose behalf no argument was made. *Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547, 552.

In the case cited the motion was even permitted to be made by an *amicus curiae*. *Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547, 552.

The text of the provisions of the Revenue Act of 1926, as well as of the similar provisions of the State statutes of Arizona, Arkansas, Colorado, Kansas, Kentucky, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee and West Virginia is printed as Appendix A hereto. The substance of the gift tax provisions of the Revenue Act of 1924 is printed as Appendix B hereto.

We trust that it may not be improper to add to the statement of the grounds of the motion some comment to indicate the importance to the Federal Government of the question involved in the case as a reason why it should be reopened and any other accorded the opportunity to be heard.

The gift tax of the revenue act of 1924, which is superseded by the conclusive presumption of the 1926 act, was not a distinct tax. It was merely corrolary to the estate tax imposed by part I, Title III, the gift tax being imposed by part II of the same title, and was regarded by Congress as being essential to preserve the efficacy of the estate tax, the rate imposed and the exemptions granted being in substance the same. It is apparent from the Congressional debates that while it was imposed for revenue purposes, its substantial object was to prevent evasion of the estate tax and the high surtaxes of the income tax law resulting from the fact that persons of large wealth divided and administered their estates by direct gifts or by creation of trusts while still living. It apparently was well understood that although some direct revenue

would be obtained from the gift tax, the chief purpose to be accomplished was substantial increase in revenue from the estate tax. See 65 Congressional Record 3119, *et seq.*; 3170, *et seq.*, and 8094, *et seq.* Revenues of the Government from the estate and income taxes have been seriously impaired, and the rebuttable presumption that gifts made within two years prior to death were made in contemplation thereof under sec. 301 (c) of the estate tax law was largely ineffective for want of evidence available to the revenue officials.

The constitutionality of the gift tax was upheld by the United States District Court for the Western District of Michigan, Southern Division, in the case of *Blodgett v. Holden*, decided February 17, 1926, and the substance of the foregoing statement appears in the opinion of Judge Raymond.

A contrary decision was made by Judge Hand of the United States District Court, Southern District of New York on February 15, 1926.

Both decisions are reported in the Prentice-Hall, Inc., Service under Federal Inheritance, 12,752 A-N.

The conclusive presumption that gifts made within a fixed period of the death of the donor shall be deemed to be made in contemplation of death within the meaning of the inheritance tax laws of Wisconsin and the other States referred to, was intended to accomplish the same purpose and was enacted for the same reason that the gift tax was passed by Congress. The fact that Congress has now abandoned the gift tax and adopted the conclusive presumption feature of the state inheritance tax laws in lieu thereof for the efficient enforcement of Federal estate tax provisions of the revenue act, and that, as we understand it, any such clas-

sification is now held invalid, we believe, makes a rehearing proper and necessary in this case.

Respectfully submitted,

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants in Error.

United States of America, State of Wisconsin, County of Dane, ss.:

Herman L. Ekern, Attorney General, and Franklin E. Bump, Assistant Attorney General, of the State of Wisconsin, counsel for the defendants in error in the above-entitled cause, each for himself, does hereby certify that the above and foregoing motion for a rehearing is presented in good faith, and not for delay.

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants-in-Error.

APPENDIX A

Text of pertinent provisions of the United States Revenue Act of 1926, approved February 26, 1926.

Also, for comparison, the provisions of the Revenue Act of 1924.

Also excerpts from the provisions of the inheritance tax laws of Arizona, Arkansas, Colorado, Kansas, Kentucky, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee and West Virginia.

UNITED STATES

Revenue Act of 1926.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers* SHALL BE DEEMED AND HELD TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF THIS TITLE. Any transfer of a material part of his property in the nature of a final disposition or dis-

tribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments* SHALL BE DEEMED AND HELD TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF THIS TITLE; * * *."

UNITED STATES.

REVENUE ACT OF 1924.

The Revenue Act of 1924, Public—No. 176—68th Congress, approved June 2, 1924, contained the following provisions under Sec. 302:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with

respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, UNLESS SHOWN TO THE CONTRARY, *be deemed to have been made in contemplation of death within the meaning of Part I of this title;*

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth; * * *."

Paragraphs (c) and (d) as contained in the Revenue Act of 1926 are not to be found in any prior act.

(The italics and capitals are ours.)

TEXT OF SIMILAR PROVISIONS OF STATE STATUTES

ARIZONA

[Laws of 1922, Chs. 26 and 26A. Sec. 1 (3).]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable

consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

ARKANSAS

[Stats. of 1923, Sec. 10218 (3).]

"Every transfer by deed, grant, bargain, sale or gift made within three years prior to the death of the grantor, vendor, or donor, of the value of five hundred dollars ($500), or in excess thereof, at the time of such transfer in the nature of final disposition or distribution of the estate and without adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this chapter."

COLORADO

[Laws of 1921, Ch. 144, Sec. 2, Par. C.]

"* * * * any such gift, or any such deed, grant, bargain, sale, assignment or contract without valuable and adequate consideration (i. e., a consideration equal in money or moneys worth to the full value of the property transferred) made within one year prior to the death of the decedent shall be deemed and held to have been made in contemplation of the death of the decedent."

KANSAS

[Stats. of 1923, Ch. 79, Sec. 79-1501, Par. 3.]

"* * * Property shall be deemed to have been transferred by grant or gift in contemplation of death under this act when such grant or gift shall have been executed within ninety days prior to the death of the grantor or donor."

KENTUCKY

[Laws of 1924, Ch. 111, Sec. 1, Par. 2.]

"Every transfer made within three years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section. And in the event a transfer was made more than three years prior to the death of the decedent, it shall be a question of fact to be determined by the proper tribunal whether such transfer was made in contemplation of death."

MISSISSIPPI

[Laws of 1924, Ch. 134, Sec. 5 (1) (f).]

"* * * any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by a decedent within two years of his death without such consideration, shall be deemed to have been made in contemplation of death within the meaning of this act."

MISSOURI

[Stats. of 1919 as amended in 1921 and 1923. Sec. 558.]

"* * * Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. * * *"

NORTH CAROLINA

[Inheritance Tax Act of 1925, Sec. 6, Par. Sixth.]

"All advancements and gifts equal to or in excess of three per cent of the decedent's estate at the time such advancements or gifts were made, and made within three years of the decedent's death, shall be subject to the inheritance tax herein prescribed as of the date of the death of the decedent. Any transfers or conveyances made upon consideration that was grossly inadequate within the same period shall be an inheritance to the extent that the consideration was inadequate at the time it was made, and shall be subject to the inheritance tax herein prescribed as of the date of the death of the decedent."

NORTH DAKOTA

[Laws of 1919, Ch. 225, Sec. 1, Par. (3).]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

SOUTH CAROLINA

[Laws of 1922, p. 800, Sec. 1, Par. c.]

"* * * Transfers of property by gift or deed, between parties related by blood or marriage, made and completed within five years prior to death, and without an adequate, valuable consideration, shall be considered made in contemplation of death."

TENNESSEE

[Laws of 1919, Ch. 46, Sec. 1, Par. (4).]

"* * * and every such transfer made within two (2) years next preceding the date of such death without consideration equal in money or money's worth to the full value of the property transferred, shall be construed to have been made in contemplation of death within the meaning of this Act; * * *"

WEST VIRGINIA

[Laws of 1904, Ch. 6, Sec. 1, Par. (c), as amended by Laws of 1921, Extraordinary Session, Ch. 3.]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within three years prior to the death of the grantor, bargainor, vendor, or donor, of value of five hundred dollars, or in excess thereof, at the time of such transfer in the nature of final disposition, or distribution of an estate, and without adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this chapter. * * *"

APPENDIX B

Substance of the Gift Tax Provisions of the Revenue Act of 1924.

Section 319 provides that for the calendar year 1924 and each calendar year thereafter, a tax based upon a certain graduated scale therein set forth is imposed upon the transfer by gift of any property wherever situated, whether made directly or indirectly. The table of percentages provides for various rates, beginning at 1 per cent on an amount of taxable gifts not in excess of $50,000.00, 2 per cent of the amount by which the taxable gifts exceed $50,000.00, and do not exceed

$100,000.00, and so on, the rates gradually increasing to a maximum of 40 per cent on the amount of taxable gifts in excess of ten million dollars.

Section 320 provides in substance that if the gift is made in property, the fair market value shall be considered the amount of the gift, and where property is sold or exchanged for less than a fair consideration the difference between the actual consideration and fair market value shall be deemd a gift.

Section 321 provides in substance for the following exemptions:

1. Gifts aggregating in value $50,000.00 in any calendar year;

2. Gifts for public purposes or to corporations organized exclusively for religious, charitable, scientific, literary, educational or similar purposes;

3. Gifts to any one person aggregating $500.00 in any calendar year;

4. Property transfer by gift identified as having been received by the donor within five years prior to the gift and upon which a gift tax has been paid.

Section 322 contains appropriate provisions to prevent the duplication of the estate tax and gift tax upon the same property.

Sections 323 and 324 provide for filing of returns and the payment of the tax assessed thereon.

SUPREME COURT OF THE UNITED STATES.

No. 146.—October Term, 1925.

Armin A. Schlesinger, Harry J. Schlesinger, and Myron T. MacLaren, Executors, etc., et al., Plaintiffs in Error, *vs.* The State of Wisconsin and County of Milwaukee.	In Error to the Supreme Court of the State of Wisconsin.

[March 1, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

Section 1087-1, Chapter 64ff, of the Wisconsin Statutes 1919, provides—

> A tax shall be and is hereby imposed upon any transfer of property, real, personal, or mixed . . . to any person . . . within the State, in the following cases, except as hereinafter provided:
>
> (1) When the transfer is by will or by the intestate laws of this State from any person dying possessed of the property while a resident of the State.
>
> (3) When a transfer is by will or intestate law, of property within the State or within its jurisdiction and the decedent was a nonresident of the State at the time of his death.
>
> (3) When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this State, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. *Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution*

thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section.

These provisions were taken from § 1, c. 44, Laws of 1903, except that the last sentence of subdiv. 3 (italicized) was added by c. 613, Laws of 1913.

Section 1087 2, c. 64ff, imposes taxes upon transfers described by § 1087 1 varying from one to five per centum, according to relationship of the parties, when the value is not above twenty five thousand dollars. On larger ones the rates are from two to five times higher, with fifteen per centum as the maximum.

"Section 1087 5 [c. 64ff]. 1. All taxes imposed by this act shall be due and payable at the time of the transfer, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment."

Other provisions of c. 64ff provide for determination, assessment and collection of the tax. In the Revised Statutes of 1921 and 1925 c. 64ff became c. 72, and section numbers were changed—1087 1 became 72 01, 1087 2 became 72 02, 1087 5 became 72 05, etc.

In *Estate of Ehling* (1919), 169 Wis. 132, the court held: "Section 1087 1, Stats., as amended by c. 613, Laws 1913, which provides that gifts of a material part of a donor's estate, made within six years prior to his death, shall be construed to have been made in contemplation of death so far as transfer taxes are concerned, constitutes a legislative definition of what is a transfer in contemplation of death, and not a mere rule of law making the fact of such gifts *prima facie* evidence that they were made in contemplation of death."

Estate of Stephenson, 171 Wis. 462, 469. A gift of twenty three thousand dollars constitutes a material part of an estate valued at more than a million dollars; also, gifts by decedents in contemplation of death must be treated, for purposes of taxation, as part of their estates.

In re Uihlein's Will, Wis. [May 12, 1925] "As stated in the Schlesinger case, the statute was enacted for the purpose of enabling the taxing officials of the State to make an efficient and

practical administration of the inheritance tax law. . . . It is settled in this State that the tax attaches, not at the date of the transfer of the gift, but at the date of the death of the donor. . . . Under our decisions the gifts that have been made within six years of the donor's death, together with the amount of the estate left by the donor at the time of his death, constitute his estate, and must be administered, so far as inheritance tax proceedings are concerned, as one estate. The tax does not attach and become vested in the State until the death of the donor. When the gift is made and the donee receives it, there is no certainty that an inheritance tax will ever be levied upon the gift."

In the present cause the Milwaukee County Court found that Schlesinger died testate January 3, 1921, leaving a large estate; that within six years he had made four separate gifts, aggregating more than five million dollars, to his wife and three children; that none of these was really made in view, anticipation, expectation, apprehension or contemplation of death. And it held that because made within six years before death these gifts "are by the express terms of § 72.01 [formerly § 1087-1], Clause (3), of the statutes subject to inheritance taxes, although not in fact made in contemplation of death." An appropriate order so adjudged. The executors and children appealed; the Supreme Court affirmed the order (184 Wis. 1); and thereupon they brought the matter here.

Plaintiffs in error maintain that, as construed and applied below, the quoted tax provisions deprive them of property without due process of law, deny them the equal protection of the laws, and conflict with the Fourteenth Amendment.

The Supreme Court of the State said: "The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law." "Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death," [which means] "that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature." "In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death." "We agree with the applicants

that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered. We adhere to the ruling in the Ebeling case."

No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.

The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B".

Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

No new doctrine was announced in *Stebbins* v. *Riley*, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. *Mobile, etc., R. R.* v. *Turnipseed*, 219 U. S. 35, 43, discusses the doctrine of presumption.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Mr. Justice SANFORD concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 146.—October Term, 1925.

Armin A. Schlesinger, Henry J. Schlesinger, and Myron T. MacLaren, Executors, etc., et al., Plaintiffs in Error, *vs.* The State of Wisconsin and County of Milwaukee.	In Error to the Supreme Court of the State of Wisconsin.

[March 1, 1926.]

Mr. Justice Holmes, dissenting.

If the Fourteenth Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But even now it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

The present seems to me one of those questions. I leave aside the broader issues that might be considered and take the statute as it is written, putting the tax on the ground of an absolute presumption that gifts of a material part of the donor's estate made within six years of his death were made in contemplation of death. If the time were six months instead of six years I hardly think that the power of the State to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. I think that our discussion should end if we admit what I certainly believe, that

reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in order to make effective a prohibition of the sale of beer. The power "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201, 204. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 283. In such cases, and they are familiar, the Fourteenth Amendment is invoked in vain. Later cases following the principle of *Purity Extract & Tonic Co.* v. *Lynch* are *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Co.* v. *Hope*, 248 U. S. 498, 500. See further *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246.

I am not prepared to say that the legislature of Wisconsin, which is better able to judge than I am, might not believe, as the Supreme Court of the State confidently affirms, that by far the larger proportion of the gifts coming under the statute actually were made in contemplation of death. I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them. *James Everard's Breweries* v. *Day*, 265 U. S. 545, 559.

It may be worth noticing that the gifts of millions taxed in this case were made from about four years before the death to a little over one year, the last being after the donor had had an attack of angina pectoris, although he is said to have attributed his sufferings to a less serious cause. The statute is not called upon in its full force in order to justify this tax. If I thought it necessary I should ask myself whether it should not be construed as intending to get as near to six years as it constitutionally could, and whether it would be bad for a year and a month.

Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.